89-1818

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID I. SMITH,

Petitioner,

v.

ROBERT MCDONALD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. May the Court of Appeals, in 1990, provide a libel defendant with an absolute privilege pursuant to state common law when:

(a) the District Court, in the same case, found the applicable state common law privilege to be qualified in 1983 and again in 1988;

(b) the 1983 District Court Order was appealed and affirmed on other grounds by the Court of Appeals in 1984;

(c) this Court affirmed the earlier decisions finding the applicable state common law privilege to be qualified; and

(d) the absolute privilege found by the Court of Appeals is without support in the common law of the State?

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No.

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v.

ROBERT MCDONALD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner David I. Smith respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on February 2, 1990.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. A at 1a-10a) is reported at 895 F.2d 147 (4th Cir. 1990). The opinion of the District Court for the Middle District of North Carolina (App. B at 11a-24a), together with that court's judgment (App. C at 25a-31a), is reported at 713 F. Supp. 871 (M.D.N.C. 1988).

The earlier opinion of this Court in this case (App. D at 32a-44a) is reported at 472 U.S. 479, 105 S.Ct. 2787, 85 L.Ed.2d 384 (1985). The opinion of the Court of Appeals for the Fourth Circuit in the earlier appeal

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[1] The caption contains the names of all parties.

(App. F at 45a-50a) is reported at 737 F.2d 427 (4th Cir. 1984). The opinion of the District Court for the Middle District of North Carolina which resulted in the earlier appeal (App. G at 51a-74a) is reported at 562 F. Supp. 829 (M.D.N.C. 1983).

JURISDICTION

The judgment of the Fourth Circuit was entered on February 2, 1990 (App. A at 10a). The Order of the Fourth Circuit denying rehearing and rehearing *en banc* was entered February 28, 1990 (App. H at 75a). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The United States Code provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652.

STATEMENT OF THE CASE

This is a libel action brought by Petitioner David I. Smith (Smith). Smith, a resident of North Carolina, is a practicing attorney. After the 1980 general election, it became known that there would be a vacancy in the office of United States Attorney for the Middle District of North Carolina and Mr. Smith, individually and through numerous friends and associates, made application for this position.

On December 1, 1980, Respondent Robert McDonald (McDonald) wrote and mailed a letter to Ronald Reagan opposing Smith's candidacy, noting copies to Edwin Meese, Barry M. Goldwater, Jr., and Jack Kemp. McDonald ad-

mits mailing copies of the letter to Edwin Meese and to the office and staff of Senator Jesse Helms. Congressman Gene Johnston received and read a copy of McDonald's letter.

On February 13, 1981, McDonald wrote and mailed a second letter to President Reagan critical of Mr. Smith, and noted copies to Edwin Meese, Barry Goldwater, Jr., Jesse Helms, and William Webster. McDonald admits mailing copies of this letter to Mr. Meese, Senator Helms and FBI Director William Webster. Congressman Johnston also received and read a copy of the second letter.

Numerous other persons saw and read these letters and, as a result of Smith's efforts to salvage his candidacy, the letters received even broader publication.

Based upon the libelous material contained in the two letters, Smith filed the complaint in North Carolina state court. McDonald, a Virginia resident, removed the case to the United States District Court for the Middle District of North Carolina on grounds of diversity of citizenship.

McDonald thereafter moved for judgment on the pleadings. On April 28, 1983, the District Court ruled against petitioner and filed a written opinion. App. G. App. 7a. The District Court examined the applicable common law and held:

> Under the common law of North Carolina, communications to public officials regarding the fitness of subordinates for public office are entitled to only a qualified privilege. *Angel v. Ward*, 43 N.C.App. 288, 258 S.E.2d 788 (1979); *Dellinger v. Belk*, 34 N.C. App. 488, 238 S.E.2d 788 (1977), *dis. rev. denied*, 294 N.C. 182, 241 S.E.2d 517 (1978); *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 755 (1891). In such cases, the plaintiff can therefore recover only

> if he can prove the malicious intent of the defendant and the falsity of the statements. *Angel v. Ward*, 258 S.E.2d at 789; *Ponder v. Cobb*, 126 S.E.2d at 80; *Alexander v. Vann*, 104 S.E.2d at 361; *Ramsey v. Cheek*, 13 S.E. at 775.
>
> Were the instant case governed solely by the common law, McDonald would be clearly entitled to only a qualified privilege.

App. G at 56a-57a; *see id.* at 54a-57a. The District Court went on to reject McDonald's claim of an absolute privilege pursuant to the Petition Clause of the First Amendment. App. G at 57a-74a.

McDonald appealed to the Fourth Circuit, which affirmed addressing only the constitutional question. App. F.

This Court granted certiorari and affirmed. App. E. Not only did this Court determine the constitutional question, the applicable common law privilege was identified.

> Under state common law, damages may be recovered only if petitioner is shown to have acted with malice; "malice" has been defined by the Court of Appeals of North Carolina, in terms that court considered consistent with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), as "knowledge at the time that the words were false, or . . . without probable cause or without checking for truth by the means at hand." *Dellinger v. Belk*, 34 N.C. App. 488, 490, 238 S.E.2d 788, 789 (1977). We hold that the Petition Clause does not require the State to expand this privilege into an absolute one. The right to petition is guaranteed; the right to commit libel with impunity is not.

App. E at 38a. That is, the state common law privilege applicable to this case is a qualified privilege which is overcome if the jury finds that McDonald acted with malice.

The District Court then tried the case providing McDonald with the qualified privilege the Court had said was applicable both by state common law and the First Amendment. The jury examined ten specific portions of the two letters and found nine false "in some material particular" and not "substantially true." Of those nine false statements, the jury found eight to have been made with constitutional malice. On May 20, 1988, the jury returned a verdict for Smith and awarded $50,000.00 in compensatory damages and $150,000.00 in puntive damages. App. C.

On August 25, 1988, the District Court denied McDonald's post-trial motion, App. B, and McDonald filed this appeal on September 20, 1988.

The Fourth Circuit reversed, finding an absolute privilege available to McDonald pursuant to North Carolina common law. App. A. That privilege was identified as a quasi-judicial privilege. App. A at 10a.

The only North Carolina case that the Fourth Circuit purported to rely upon was *Angel v. Ward*, 43 N.C. App. 288, 258 S.E.2d 788 (1979). *Angel* did not involve an applicant for public employment, rather it involved a public employee who sued someone who was critical of her to her supervisors. The North Carolina Court of Appeals (the state's intermediate appellate court) did not apply the uninterrupted 100 years of precedent from the North Carolina Supreme Court establishing the qualified privilege available for communication to public officials regarding the fitness of subordinates for public office. *See id.* at 292, 258 S.E.2d at 791. The *Angel* court relied instead upon the existence of a "proceeding [that] was quasi-judicial in nature" as evidenced by the defendant's letter being submitted "upon the request of plaintiff's immediate supervisor" involved in an administrative "proceeding" to terminate plaintiff's employment. *Id.* at 293-94, 258 S.E.2d at 792.

The Fourth Circuit did not address the broad publication of the letters to persons unrelated to the selection process, but relied upon its conclusion that the "President was performing a quasi-judicial function." App. A at 10a. Nor did the Fourth Circuit address the necessity under North Carolina law that there be some "proceeding" in which, or associated with which, the judicial and quasi-judicial privilege may arise. *See Angel v. Ward*, 43 N.C. App. at 293-94, 258 S.E.2d at 792 (upon which the Fourth Circuit purported to rely); App. A at 9a.

The Fourth Circuit acknowledged that "no North Carolina court has determined whether the actions of an appointing authority, in evaluating and selecting a nominee for an important public position, constitute a quasi-judicial function. . ." App. at 5a. Nevertheless, in the face of this Court's statement of the applicable law, the Fourth Circuit reversed.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION AS TO THE APPLICABLE STATE LAW IS IN DIRECT CONFLICT WITH THIS COURT'S DETERMINATION OF THE APPLICABLE STATE LAW IN THE EARLIER APPEAL OF THIS CASE.

This Court decided in 1985 that the state common law privilege available to McDonald is qualified. App. E. at 38a. Now, five years later, the Fourth Circuit has chosen to reverse this Court *sub silentio* and declare the applicable privilege to be absolute. App. A. The Fourth Circuit apparently misapprehends its role.

The scope of the state common law privilege was properly before this Court in the earlier appeal, both because it was addressed at some length by the District Court in the order giving rise to that appeal, *see* App. G at 54a-57a, and because this Court would not have addressed the character of the First Amendment privilege if an absolute

common law privilege made it unnecessary to decide the constitutional question. *See Ashwater v. TVA*, 297 U.S. 228, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688, 711 (1936) (Brandeis, J., dissenting in part).

The District Court, in denying McDonald's motion for judgment on the pleadings, examined the common law privilege and found no absolute privilege available. Only upon determining the common law privilege to be qualified did the District Court address McDonald's claim of an absolute privilege pursuant to the Petition Clause of the First Amendment.

The appeal of that order resulted in this Court's first examination of this case, with the common law privilege question properly included.

This Court will not reach a constitutional issue properly presented to it where it can rely in its disposition on a nonconstitutional grour l. *Escambia County v. McMillan*, 466 U.S. 48, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981⊥; *Conner v. Waller*, 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975); *Shea v. Vialpando*, 416 U.S. 251, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974).

Justice Brandeis stated the applicable policy in his dissenting opinion in *Ashwater v. TVA*:

> The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
>
> . . . .
>
> 2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, N.Y. & P.S.S. Co. v. Emigration Comrs.*, 113 U.S. 33, 39, 28 L.Ed.2d 899, 901, 5 S.Ct. 352; *Abrams v. Van Schaick*, 293 U.S. 188, 79 L.Ed. 278, 55 S.Ct. 135; *Wilshire Oil Co. v. United*

> *States*, 295 U.S. 100, 79 L.Ed. 1329, 55 S.Ct. 673. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295, 49 L.Ed. 482, 485, 25 S.Ct. 243.
>
> . . . .
>
> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler v. Louisville & N.R. Co.*, 213 U.S. 175, 191, 53 L.Ed. 753, 757, 29 S.Ct. 451; *Light v. United States*, 220 U.S. 523, 538, 55 L.Ed. 570, 575, 31 S.Ct. 485. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. *Berea College v. Kentucky*, 211 U.S. 45, 53, 53 L.Ed. 81, 85, 29 S.Ct. 33.

Ashwater v. TVA, 297 U.S. at 346-47, 56 S.Ct. at 482-83, 80 L.Ed. at 710-11 (footnote omitted).

Consistent with that long-standing policy, this Court examined McDonald's constitutional claim in light of its determination that the question of absolute privilege was not determined by state common law.

> Under state common law, damages may be recovered only if petitioner is shown to have acted with malice; "malice" has been defined by the Court of Appeals of North Carolina, in terms that court considered consistent with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), as "knowledge at the time that the words are false, or . . . without probable cause or without checking for truth by the means at hand." *Dellinger v. Belk*, 34 N.C. App. 488, 490, 238 S.E.2d 788, 789 (1977). We hold that the Petition Clause

> does not require the State to expand this privilege into an absolute one. The right to petition is guaranteed; the right to commit libel with impunity is not.

App. E. at 38a.

The appellate courts of North Carolina had taken no action addressing this question since this Court's 1985 opinion and, indeed, the Fourth Circuit relied only on cases decided well before this litigation. *See* App. A at 5a. (citing *Angel v. Ward*, 43 N.C. App. 288, 258 S.E.2d 788 (1979)); *id.* at 7a (citing *Holmes v. Eddy*, 341 F.2d 477 (4th Cir. 1965)).

The Fourth Circuit has reversed this Court in an unseemly misapprehension of its role that has resulted in five years of litigation which, if its decision is allowed to stand, was an unnecessary waste of the resources of this Court (in the first appeal), the District Court, and the parties.

This Court in 1985 settled the question of the constitutional and common law privilege applicable to McDonald's libel. The Fourth Circuit should not be allowed to reverse the Supreme Court.

II. THE FOURTH CIRCUIT'S DECISION AS TO THE APPLICABLE STATE LAW IS WITHOUT SUPPORT IN THE STATE COURT'S DECISIONS AND RESTS UPON TORTIOUS APPLICATION OF STATE PRECEDENT. THIS COURT AND THE DISTRICT COURT FOLLOWED AND APPLIED STATE PRECEDENT IN FINDING A QUALIFIED COMMON LAW PRIVILEGE.

There is no North Carolina case determining the privilege available to one who libels an applicant for public employment to the appointing authority. *See* App. A at 5a. However, it is settled beyond question that

> [u]nder the common law of North Carolina, communications to public officials regarding the fitness

> of subordinates for public office are entitled to only a qualified privilege, *Angel v. Ward*, 43 N.C.App. 288, 258 S.E.2d 788 (1979); *Dellinger v. Belk*, 34 N.C.App. 488, 238 S.E.2d 788 (1977); *dis. rev. denied*, 294 N.C. 182, 241 S.E.2d 517 (1978); *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891).

App. G at 56a-57a. The District Court held this precedent to be applicable to McDonald's letters, a decision supported by statements of the North Carolina Supreme Court.

> "It is in the public interest that the conduct and qualifications of officials and *candidates for public office* be subjected to free and fair criticisms and discussion by their constituents, and such presents a case of *qualified privilege*. . ."

Alexander v. Vann, 180 N.C. 187, 190, 104 S.E. 360, 362 (1920) *quoting State v. Publishing Co.*, 179 N.C. 720, 723, 102 S.E. 318, 319 (1920).

Rather than apply the state law applicable to comment upon public "officials and candidates for public office," the Fourth Circuit entered upon a circuitous search for some absolute privilege.

As the District Court had observed:

> In the state of North Carolina, absolute privilege has been limited to "words used in debate in [C]ongress and the state legislatures, reports of military or other officers to their superiors in the line of duty, everything said by a judge on the bench, by a witness in the box, and the like." *Ramsey v. Cheek*, 13 S.E. at 775. *Also see Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860, 866 (1957); *Jarman v. Offutt*, 239 N.C. 468, 80 S.E.2d 248, 251 (1954); *Mitchell v. Bailey*, 222 N.C. 757, 23 S.E.2d 829 (1943). The privilege attending communications made in the course of judicial proceedings has been extended to communications in an administrative proceeding

> where the administrative officer or agency is acting in a judicial or quasi-judicial function. *Angel v. Ward*, 43 N.C.App. 288, 258 S.E.2d 788, 792 (1979); *Mazzucco v. Board of Medical Examiners*, 31 N.C.App. 47, 228 S.E.2d 529, 532, *appeal dismissed*, 291 N.C. 323, 230 S.E.2d 676 (1976).

App. G at 56a.

Rather than applying the analysis directed by the state courts and the common law generally in its consideration of this case, the Fourth Circuit proceeded to equate hiring and appointment decisions with judicial functions. App. A at 5a-10a. That approach is neither part of the common law of North Carolina, nor a reasonable extension of settled state law, nor has any court applied that approach determining the protection afforded statements made to a government appointing authority.

Angel v. Ward, upon which the Fourth Circuit relied heavily, App. A at 5a-7a, recognized that North Carolina common law provides that communications about a government employee directed to his supervisor are subject to a qualified privilege. 43 N.C.App. at 293, 258 S.E.2d at 791. The *Angel* Court, however, found a broader privilege available under the specific facts of that case. It found that the Internal Revenue Service was conducting a quasi-judicial proceeding and that an absolute privilege resulted as to statements made in and as a part of that proceeding. *Id.* at 293-94, 258 S.E.2d at 792.

Angel goes on to say that the absolute privilege attending "communications made in the course of judicial proceedings has been extended to protect communications *in an administrative proceeding only* where the administrative officer or agency *in the proceeding* in question is exercising a judicial or quasi-judicial function." *Id.* at 293, 258 S.E.2d at 792 (emphasis added), citing *Mazzucco v. Board of Medical Examiners*, 31 N.C. App. 47, 228 S.E.2d 529, *app. dismissed*, 291 N.C. 323, 230 S.E.2d 676 (1976).

Mazzucco similarly stated limited to the application of any absolute privilege:

> to protect communications *in an administrative proceeding* only where the administrative office or agency, *in the proceedings in question*, is exercising a judicial or quasi-judicial function.

Id. at 50 (emphasis added). In *Mazzucco* the alleged libel was contained in the statutorily mandated notice of charges required before the defendant Board could take action regarding the plaintiff's medical license. *Id.* at 51, 228 S.E.2d at 532. In *Angel*, similarly, there was a "proceeding"—an agency's employee termination proceeding. 43 N.C. App. at 295, 258 S.E.2d at 792. Here there is no such "proceeding."

That the existence of a "proceeding" is essential to *Angel's* result has been made affirmed by the North Carolina Court of Appeal's characterization of its holding as applicable to "communications *in administrative proceedings* where the officer or agency involved is exercising a quasi-judicial function." *Harris v. NCNB*, 85 N.C. App. 669, 673, 355 S.E.2d 838, 842 (1987) (emphasis added).

The Fourth Circuit opined that the President was "performing a quasi-judicial function with regard to the entire pool of applicants." App. A at 6a n.4. That conclusion is faulty in that it ignores the settled state law regarding evaluation of candidates. *See State v. Publishing Co.*, 179 N.C. at 723, 102 S.E. at 319; *Alexander v. Vann*, 180 N.C. at 190, 104 S.E. at 362. Even if correct, as to the "functions," however, there was no "proceeding" within which the President was acting as required by *Angel* and *Mazzucco*. This issue was simply not addressed by the Fourth Circuit.

Further, the immunity in a judicial proceeding "is justified only insofar as is necessary to protect the judicial process." *Mazzucco*, 31 N.C. App. at 50, 228 S.E.2d at

532 (citing *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)). No judicial or quasi-judicial process is protected by granting absolute immunity to McDonald's malicious lies.

The privilege available pursuant to North Carolina common law is dependent upon the occasion, circumstances and audience of the publication. McDonald's lies were published too broadly to have benefit of the privilege found by the Fourth Circuit.

"The republication of a libel, in circumstances when the initial publication is privileged, is generally unprotected." *Doe v. McMillan*, 412 U.S. 306, 314 n.8, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973). In North Carolina, common law privileges otherwise available are lost if the particular circumstances of publication and the persons to whom the publication is made are outside the scope of the privilege.

In *Ponder v. Cobb*, 257 N.C. 281, 296, 126 S.E.2d 67, 78 (1962), the Supreme Court of North Carolina found a qualified privilege available to one who criticized public officials' conduct because the material was "addressed to . . . *proper parties from or through whom redress might be expected.*" *Accord, Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 273, 365 S.E.2d 665, 668 (1988) (qualified privilege available because not excessively published); *Dillinger v. Belk*, 34 N.C. App. 488, 490, 238 S.E.2d 788, 789-90 (1977).

"[I]t is not the publication itself, but the occasion of its publication, that is privileged." *Ponder v. Cobb*, 257 N.C. at 295, 126 S.E.2d at 78. Misdirecting or too broadly publishing defamatory material results in loss of the protection of any common law privilege. *Scott v. Harrison*, 215 N.C. 427, 429, 2 S.E.2d 1, 2 (1939) (persons to whom defamatory statement published not so related to subject matter as to make privilege available); *Alexander v. Vann*, 180 N.C. at 190-91, 104 S.E. at 362

(qualified privilege unavailable because criticism of deputy sheriff plaintiff directed to sheriff of another county who "had no jurisdiction whatever to entertain the complaint, or to redress the grievance if there had been any."); *Logan v. Hodges*, 146 N.C. 38, 41, 59 S.E. 349, 351 (1907) (defamation about county treasurer to school superintendant not privileged because school superintendant had "no jurisdiction to entertain the complaint, or power to redress the grievance, or some duty to perform, or intent in connection with it."). *See Stewart v. Check Corp.*, 279 N.C. 278, 285-86, 182 S.E.2d 410, 415-16 (1971) (publishing defamation more broadly than the privilege contemplates results in loss of benefit of privilege); *Alpar v. Weyerhaeuser Co., Inc.*, 20 N.C. App. 340, 346, 201 S.E.2d 503, 508 (1974) (privilege may be lost by proof of "excessive publication.").

McDonald failed to limit the publication of his defamatory letters to those involved in the process of appointment of United States Attorneys. Publication was broad and included local citizens, local attorneys, and local Alamance County politicians.[2] In fact, although McDonald and the Fourth Circuit rely upon publication to the President for the existence of privilege, there is no evidence that the President or his close advisors received or read the letters.

The Fourth Circuit did not address McDonald's broad publication of his lies. It relied upon *Angel* and *Holmes v. Eddy*, 341 F.2d 477 (4th Cir. 1965) both of which involve matters published only to the federal government agency directly responsible for acting on the information. App. A at 9a. *Angel* addressed publication *only* to the Internal Revenue Service, plaintiff's employer.

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[2] Indeed, on December 1, 1980, the date of the first letter, Reagan remained a private citizen, not President until January 20, 1981, U.S. Const. Amend. XX, nor even president-elect until the Electors had voted and had their votes counted, U.S. Const. Art. II, § 1, cl. 4; 3 U.S.C. §§ 7, 15.

Holmes addressed a publication made *only* to the Securities and Exchange Commission, the appropriate federal authority to investigate and prosecute Holmes.

McDonald's letters were too broadly published to come within the rule announced by the Fourth Circuit.

III. THE FOURTH CIRCUIT IGNORED SOUND, FIRMLY ESTABLISHED JUDICIAL POLICY AFFECTING DEFERENCE TO DISTRICT COURTS AND THE SCOPE OF APPELLATE REVIEW.

This Court has instructed that, "standing alone, a challenge to state-law determination by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Harding v. Prosise*, 462 U.S. 306, 314 n.8, 103 S.Ct. 2368, 2373 n.8, 76 L.Ed.2d 595, 604 n.8 (1983). That position is taken, however, within the context of the Court's practice "to accept a *reasonable* construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.'" *Id.*, *quoting Bishop v. Wood*, 426 U.S. 341, 346, 96 S.Ct. 2074, 2078, 48 L.Ed.2d 684, 691 (1976) (emphasis added).

Here, however, the Fourth Circuit's determination is not only unreasonable, as discussed above, it has failed to follow or even discuss its similar policy of deference to the District Court's determination of state law questions. *See* App. A generally.

The Fourth Circuit purports to have the following policy:

> In determining state law in diversity cases where there is no clear precedent, courts of appeals are disposed to accord substantial deference to the opinion of a federal district judge because of his familiarity with the state law which must be applied.

Caspary v. Louisiana Land & Exploration Co., 707 F.2d 785, 788 n.5 (4th Cir. 1983) (referring to such a district court opinion as "authoritative").[3]

The Fourth Circuit's cavalier disregard for the District Court's opinion and its own policy provides an atypical context in which to examine its state law decision—if, indeed, its disregard of this Court's determination of that question were not sufficiently remarkable to require further review.

The Fourth Circuit's decision also runs afoul of the law of the case doctrine. This Court determined the applicable state common law privilege in the earlier appeal. "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *U.S. v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198, 70 S.Ct. 537, 544, 94 L.Ed. 750, 760-61 (1950).

As the Fifth Circuit has formulated the doctrine, the law of the case "must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence or a subsequent trial was substantially different, controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967); *see, e.g. U.S. v. McClain*, 593 F.2d 658, 664-65 (5th Cir.), *cert. denied*, 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979).

The only way that this Court's earlier opinion could be viewed as not having decided the applicable state common law privilege is to assume that this Court disre-

[3] In *Caspary*, the Fourth Circuit weighed heavily the state antecedents of the panel members. In this case, no member of the panel have North Carolina antecedents. *See* App. A at 1a.

garded its policy not to decide constitutional questions unnecessarily. It is inappropriate for the Fourth Circuit to make such an assumption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 21, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1401

DAVID I. SMITH,
Plaintiff-Appellee,

versus

ROBERT MCDONALD,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of North Carolina, at Greensboro
Frank W. Bullock, Jr., District Judge (CA-81-475-G)

Argued: May 8, 1989 Decided: February 2, 1990

Before RUSSELL and WIDENER, Circuit Judges, and TURK, Chief United States District Judge for the Western District of Virginia, sitting by designation.

William Woodward Webb (BROUGHTON, WILKINS, WEBB & GAMMON, on brief) for Appellant. William Albert Eagles (B. F. Wood, LATHAM, WOOD, EAGLES & HAWKINS, on brief) for Appellee.

WIDENER, Circuit Judge:

Robert McDonald appeals from judgment on a jury verdict in a libel case against him which awarded both compensatory and punitive damages. Because we conclude that McDonald's statements were absolutely privileged under the common law of North Carolina, we reverse.

Robert McDonald sent two letters to the President of the United States, with copies to a few other public officials, concerning David I. Smith, an attorney who actively was seeking to be appointed United States Attorney for the Middle District of North Carolina. McDonald's letters related what he said were numerous details about Smith's character and previous conduct that McDonald felt rendered Smith unfit to be United States Attorney. After the President chose not to appoint Smith, Smith instituted a common law action for libel in a North Carolina state court, alleging that the statements in McDonald's letters were "false, slanderous, libelous, inflammatory, and derogatory." In addition, Smith alleged that McDonald composed the letters maliciously and with evil intent.

McDonald removed the action to federal court on the basis of diverse citizenship, and subsequently filed a motion for judgment on the pleadings on the ground that his communications to the President were absolutely privileged under the petition clause of the first amendment and the appointments and speech or debate clauses of the United States Constitution. The district court denied the motion.[1] On appeal, both this court and the United States Supreme Court affirmed, finding that the Constitution conferred no absolute constitutional privilege on McDonald's letters, rather a qualified constitutional privilege under the petition clause of the first amendment, and the case was remanded to the district

[1] *Smith v. McDonald*, 562 F. Supp. 829 (M.D.N.C. 1983).

court.[2] Upon a trial by jury, a verdict was returned against McDonald in the amount of $50,000 compensatory damages and $150,000 punitive damages, which specifically found that some of the statements in McDonald's letters were both false and made with reckless disregard of whether false or not, the equivalent of malice. McDonald now appeals, arguing that his letters to the President were absolutely privileged under North Carolina common law.[3]

The parties tacitly agree that the common law of North Carolina governs this libel action. Accordingly, the parties not arguing otherwise, the substantive law of the forum controls, and we apply North Carolina law. *See National Ass'n of Sporting Goods Wholesalers v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1284-85 (7th Cir. 1985).

Whether the occasion is privileged is a question of law to be determined by the court. *Stewart v. Nation-Wide Check Corp.*, 182 S.E.2d 410, 414 (N.C. 1971). Privilege is determined by the occasion and circumstances surrounding a communication, and may be either "absolute" or "qualified." *Ramsey v. Cheek*, 13 S.E. 775, 775 (N.C. 1891). The Supreme Court of North Carolina in *Ramsey* distinguished the two types of privileged communications as follows:

> Privileged communications are of two kinds: (1) Absolutely privileged,—which are restricted to cases in which it is so much to the public interest that the defendant should speak out his mind fully and freely that all actions in respect to the words used are absolutely forbidden, even though it be alleged that they were used falsely, knowingly, and with

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[2] *Smith v. McDonald*, 737 F.2d 427 (4th Cir. 1984); *McDonald v. Smith*, 472 U.S. 479 (1985).

[3] Because we conclude that McDonald's statements were absolutely privileged under North Carolina common law, we need not consider McDonald's other assignments or error.

> express malice. This complete immunity obtains only where the public service or the due administration of justice requires it, *e.g.*, words used in debate in Congress and the state legislatures, reports of military or other officers to their superiors in the line of their duty, everything said by a judge on the bench, by a witness in the box, and the like. In these cases the action is absolutely barred. (2) Qualified privilege. In less important matters, where the public interest does not require such absolute immunity, the plaintiff will recover in spite of the privilege if he can prove that the words were not used *bona fide*, but that the defendant used the privileged occasion artfully and knowingly to falsely defame the plaintiff. In this class of cases an action will lie only where the party is guilty of falsehood and express malice.

Ramsey, 13 S.E. at 775 (citations omitted). Thus, although Smith has alleged, and a jury has found, that some of McDonald's communications were both false and malicious, if those communications were absolutely privileged, Smith's action for libel must fail.

Because "[t]he great underlying principle of the doctrine of privileged communications rests in public policy," *Alexander v. Vann*, 104 S.E. 360, 361 (N.C. 1920), the settings that the *Ramsey* court identified in which communications are absolutely privileged were obviously by way of example rather than by way of limitation. And several subsequent cases have considered one of those settings in particular: statements made in the course of judicial proceedings. *See, e.g., Jarman v. Offutt*, 80 S.E.2d 248 (N.C. 1954); *Jones v. City of Greensboro*, 277 S.E.2d 562 (N.C. Ct App 1981); *Mazzucco v. North Carolina Bd. of Medical Examiners*, 228 S.E.2d 529 (N.C. Ct. App.), *petition for discretionary review denied and appeal dismissed for want of substantial constitutional question*, 230 S.E.2d 676 (N.C. 1976).

In North Carolina the absolute privilege that attaches to statements made in the course of judicial proceedings is not confined to civil or criminal trials; in determining the scope of the privilege, courts have defined the term "judicial proceeding" broadly. *Harris v. NCNB Nat'l Bank of North Carolina*, 355 S.E.2d 838, 842 (N.C. Ct. App. 1987). Thus, the privilege covers not only oral statements made during a trial, but has been extended to encompass communications in pleadings and other papers filed in a proceeding, *Scott v. Statesville Plywood & Veneer Co.*, 81 S.E.2d 146 (N.C. 1954); out-of-court affidavits or reports, if submitted to the court and relevant to the proceedings, *Bailey v. McGill*, 100 S.E.2d 860 (N.C. 1957); out-of-court statements between attorneys for the parties to a pending case, if relevant to the proceeding, *Burton v. NCNB Nat'l Bank of North Carolina*, 355 S.E.2d 800 (N.C. Ct. App. 1987); and attorneys' out-of-court communications preliminary to proposed or anticipated litigation, *Harris v. NCNB Nat'l Bank of North Carolina*, 355 S.E.2d 838 (N.C. Ct. App. 1987). In addition, communications made in the course of an administrative proceeding are absolutely privileged if the administrative officer or agency is exercising a judicial or quasi-judicial function. *Mazzucco*, 228 S.E.2d at 532. Although no North Carolina court has determined whether the actions of an appointing authority, in evaluating and selecting a nominee for an important public position, constitute a quasi-judicial function, the decision of the North Carolina Court of Appeals in *Angel v. Ward*, 258 S.E.2d 788 (N.C. Ct. App. 1979), is instructive.

In *Angel* the North Carolina Court of Appeals considered whether a private citizen's letter to a federal government employee's superior, who was collecting evidence to support a decision to terminate the employee, was sent in connection with a quasi-judicial proceeding and thus was absolutely privileged. *Angel*, 258 S.E.2d at 791-92. In *Angel* the defendant, a certified public accountant,

telephoned the superior of the plaintiff to complain about the plaintiff's conduct and competence in her position as an Internal Revenue Service agent. *Id.* at 789. After the plaintiff's supervisor asked the defendant to put his complaints in writing, the defendant sent the supervisor a letter.[4] *Id.* at 789-90. Later, the plaintiff's supervisor

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[4] The North Carolina Court of Appeals in dicta in *Angel* noted that "[h]ad defendants merely mailed the letter to plaintiff's superiors, the communication would have been entitled to a qualified privilege." *Angel*, 258 S.E.2d at 791. An other literal reading of that statement might indicate that the privilege the defendant enjoyed in *Angel* hinged on the fact that the plaintiff's supervisor made an affirmative request for the information. In an attempt to be consistent with this factual element, McDonald argues that he sent the letters in issue in response to a televised speech in which the President-elect made a general call for information and cooperation from the citizenry. In our view, such an argument is unnecessary, although it may be valid.

The plaintiff in *Angel* was, at the time the communication was made, a current government employee. Because a supervisor does not constantly investigate and evaluate every current employee with an eye toward possible termination, the *Angel* court emphasizing that the plaintiff's supervisor actually was investigating and evaluating the plaintiff and that the defendant's letter was solicited in connection with that investigation. Stated another way, evidence of the supervisor's ongoing investigation and solicitation of the letter in *Angel* was necessary to demonstrate that the supervisor was performing a quasi-judicial function in connection with the performance of his duty with respect to a particular employee, the plaintiff, at the time the defendant mailed the letter, and that the letter was not merely a complaint about the performance of a public employee and so entitled to qualified privilege. *See Ponder v. Cobb*, 126 S.E.2d 67, 76 (N.C. 1962).

Similarly, in this case the President was in the process of investigating and evaluating potential employees with an eye toward hiring one of the applicants. We think there is no significant distinction between the firing of Angel and the hiring of Smith in the case before us. Because the President sought to appoint a new employee, just as if he had dismissed a current employee, he was performing an ongoing quasi-judicial function with regard to the entire pool of applicants and the solicitation of information concerning a particular applicant is immaterial.

terminated the plaintiff's employment, and the plaintiff filed suit in libel because of the contents of the letter.

In determining whether the defendant's letter was absolutely privileged, the *Angel* court noted that quasi-judicial is "[a] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Id.* at 792 (quoting Black's Law Dictionary (4th ed. rev. 1968)). The court in *Angel* then applied the definition of the term quasi-judicial to the facts of the case:

> Mr. Allen in his solicitation of defendants' letter was acting for and on behalf of the Internal Revenue Service in a governmental matter. He was in the process of evaluating plaintiff in connection with her employment. The agency had decided to terminate plaintiff's employment, and Mr. Allen was preparing an evidentiary file to support the termination decision.

Id. Thus, because the supervisor's actions were those of one who was "required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature," the court concluded that "[t]he proceeding was quasi-judicial in nature, and defendant's communications were absolutely privileged." *Angel*, 258 S.E.2d at 792. In reaching its conclusion, the North Carolina Court of Appeals in *Angel* relied in part on a previous decision of this court that applied North Carolina law, *Holmes v. Eddy*, 341 F.2d 477 (4th Cir. 1965), a case which also merits further discussion.

In *Holmes* a stockbroker, Jay Eddy, received a letter in the mail from Hydramotive Corporation, a company that was seeking to market stock. *Holmes*, 341 F.2d at 478. On his own initiative, Eddy mailed the letter he had

received from Hydramotive to the Securities and Exchange Commission, which at the time was investigating Hydramotive and others with respect to stock sales. Before mailing the letter, Eddy had written on the letter the following: "This company looks like an attempt to bilk the public via the securities market—it has a smell similar to all such." The SEC requested that Eddy execute an affidavit as evidence that the letter was sent to him through the mails in connection with the sale of stock, which Eddy did. The SEC then brought suit against Hydramotive and other related parties and eventually obtained an injunction against the sale of the stock.

At some point after the initiation of the SEC action, Hydramotive and others who were parties defendant to the securities action instituted actions for defamation against the SEC and numerous individuals, including Eddy, alleging that the defendants conspired to and did circulate publicly untruths about the plaintiffs. This court affirmed the district court's entry of summary judgment for all defendants. Our holding in that case with respect to the claim against Eddy, if not on precisely the same facts as here, is persuasive, even if not binding precedent.

We found that, although Eddy sent the letter with his notations on it on his own initiative, no claim being made that he acted other than as a private citizen, his actions in sending the letter and in executing the affidavit at the request of the SEC were absolutely privileged. Thus, even though the SEC was not a judicial body, and despite the fact that the SEC had not filed its suit when Eddy mailed the letter, we determined that Eddy's voluntary communication to the SEC was absolutely privileged, obviously because the communication was made in connection with a judicial or quasi-judicial proceeding. We equated the privilege accorded Eddy to that given a private person who furnishes information

to a prosecutor for the purpose of initiating a prosecution.

We believe the circumstances of the instant case meet the definition of quasi-judicial, and therefore call for the application of absolute privilege, even more convincingly than did the facts in *Angel* and *Holmes*.

Pursuant to federal statute, the President must appoint, subject to the advice and consent of the Senate, a United States Attorney for each judicial district. 28 U.S.C. § 541(a). At the time McDonald sent his letters, the President and his staff were in the early stages of evaluating potential nominees for those positions. Nominees for United States Attorney are subjected to a comprehensive background investigation and are expected to appear before the Senate Judiciary Committee to answer any and all questions regarding their fitness for the position. It goes without saying that both the character and professional qualifications of the United States Attorney are of the greatest public relevance.

An application of *Angel*'s definition of quasi-judicial reveals that, in conducting the appointment process, the President was "required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for . . . official action, and to exercise discretion of a judicial nature." *Angel*, 258 S.E.2d at 792. Moreover, the doctrine of privileged communications rests in public policy. *Alexander v. Vann*, 104 S.E. 360, 361 (N.C. 1920). If public policy accords an absolute privilege to a letter sent to an IRS supervisor concerning the termination of a subordinate, and to a letter sent to the SEC concerning a securities offering, surely the President's selection of the chief law enforcement officer for a judicial district is a process in which the public interest demands the unbridled flow of information that absolute privilege can provide. In this context, the compelling need for truthful information con-

cerning those who voluntarily seek important positions of public trust outweighs the possibility that, as may be the case here, the less than scrupulous will use such an occasion to disseminate malicious falsehoods in furtherance of a personal vendetta.

Therefore, because the President was performing a quasi-judicial function in which it was "so much to the public interest that all actions in respect to the words used are absolutely forbidden," *Ramsey v. Clark*, 13 S.E. 775, 775 (N.C. 1891), McDonald's letters were absolutely privileged and cannot support an action for libel.

The judgment of the district court is accordingly

REVERSED.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil No. C-81-475-G

DAVID I. SMITH,

Plaintiff,

v.

ROBERT MCDONALD,

Defendants.

MEMORANDUM OPINION

[Filed Aug. 25, 1988]

BULLOCK, District Judge

At the trial of this libel case in May 1988 the jury awarded the Plaintiff $50,000.00 in compensatory damages and $150,000.00 in punitive damages. The defendant has moved for judgment notwithstanding the verdict, for a new trial, and for remittitur of the damages to a nominal sum. The court finds that there was sufficient evidence to support the verdict and that the amount of damages is not excessive. Accordingly, all motions will be denied and judgment will be entered on the jury's verdict.

Background

This case arises out of two letters which Robert McDonald wrote to President Reagan and other officials opposing David Smith's proposed nomination to the position

of United States Attorney for the Middle District of North Carolina. These letters, dated December 1, 1980, and February 13, 1981, respectively, charged Smith with numerous instances of misconduct and urged his rejection in no uncertain terms. Smith did not receive the nomination, and he filed this action for libel in state court in July 1981. McDonald removed the suit to this court on the basis of diversity.

Because McDonald's statements occurred in communications to the President concerning a public figure, his motion for judgment on the pleadings raised novel issues regarding the nature and extent of the privilege provided by the Petition Clause of the first amendment. Rejecting Defendant's contention that the communications were absolutely privileged, this court held that the Petition Clause confers a qualified privilege equivalent to those under the Speech and Press Clauses as interpreted in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); this decision was affirmed by the Fourth Circuit Court of Appeals and by the United States Supreme Court. *Smith v. McDonald*, 562 F. Supp. 829 (M.D.N.C. 1983), *aff'd*, 737 F.2d 427 (4th Cir. 1984), *aff'd sub nom. McDonald v. Smith*, 472 U.S. 479 (1985). Thus, the major issues at the trial concerned the truth or falsity of McDonald's statements and whether they were made "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *New York Times*, 376 U.S. at 280.

Before submitting these issues to the jury, however, the court was required to distinguish the letters' actionable statements of fact from their constitutionally-protected statements of opinion. *See Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285 n.12 (4th Cir. 1987) (opinion designation a question of law). Although much in the letters was undeniably opinion, these opinions were interspersed with admittedly factual statements. Rather than having the

jury pass on the letters as a whole, the court applied the *Potomac Valve* criteria and directed the jury's attention to specific statements of fact.[1] To obtain the most precise statement of the jury's findings and to preserve the clearest record for appellate purposes, each factual assertion was quoted in a separate issue. The jury was instructed to consider individually each assertion's truth or falsity and, if the jury found a statement untrue, to decide whether it was made with *New York Times* malice.

Ten such issues, supplemented by two issues concerning compensatory and punitive damages, were submitted to the jury.[2] The jury found that eight of the statements were false and were made with knowledge of or reckless disregard for their falsity. One statement was found to be true, and one statement was found to be false but made without malice. On the basis of the eight false and malicious statements, the jury awarded Smith $50,000.00 in compensatory damages and $150,000.00 in punitive damages.

McDonald now attacks the verdict as against the weight of the evidence, influenced by passion and prejudice, and excessive in the damages awarded. As to the eight statements found to be libelous, he argues that the evidence showed that four of these statements were true or substantially true, and that three additional statements were made without malice. He contends that the one remaining statement was a non-actionable expression of opinion. Finally, he asserts that the compensatory damage award is unsupported by the evidence and that the punitive damage award is grossly excessive. In sup-

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[1] Several of these statements, and one in particular, involved a delicate determination regarding the first amendment line between fact and opinion. Because some statements were clearly factual and were going before the jury, in close cases the court leaned toward the factual side of the line, subject to later correction—without the expense of a retrial—by this or any appellate court.

[2] The issue sheet is attached to this opinion as Appendix A.

port of the latter contention McDonald submitted a brief affidavit outlining his current financial status.

DISCUSSION

I. *The Motion for Judgment N.O.V.*

Recognizing that a single actionable statement would support a verdict against him, McDonald challenges the jury's findings on each of the eight libelous issues/statements. Although there is merit to a number of his arguments, the court need not address all of them in detail because there was sufficient evidence to support the verdict on at least three of the statements, submitted as issues numbered 1, 2, and 10. Since these three libels are also among the most damaging assertion in the letters, the motion for a j.n.o.v. must be denied.

Issues numbered 1 and 10 involve McDonald's allegation that at a hearing in a case involving McDonald's business, in which David Smith had at one time represented the opposing party, United States Magistrate Herman A. Smith termed David Smith's conduct "the most reprehensible conduct of any attorney to come before me in my twenty-five years on the bench." This alleged quote was repeated in each of the letters, hence the separate issues.

The Plaintiff's major evidence regarding these issues was the testimony of Magistrate Smith himself, who flatly denied making the statement. Magistrate Smith further testified that he saw no unethical behavior and had no occasion to reprimand David Smith regarding that particular case. The Plaintiff also presented the testimony of John Patterson, David Smith's co-counsel in the case, who testified that he observed no unethical behavior from attorney Smith and received no complaints regarding his conduct.

Unable to produce a transcript or a recording of the hearing, McDonald testified that he was present and that

Magistrate Smith's words were "the attorneys for the plaintiff were guilty of the most reprehensible conduct I've seen in twenty-five years." Although David Smith was just one of the plaintiff's attorneys and had withdrawn from the case approximately two years before this particular hearing, McDonald testified that he felt David Smith was the most guilty party among the plaintiff's attorneys. McDonald also submitted copies of a recommendation entered by Magistrate Smith in January 1977 and of a dismissal order entered by the district judge in July 1977 which detailed discovery abuses, highlighted orders which were not obeyed, and imposed a $1,000.00 sanction on the plaintiff in that case.

McDonald also presented the testimony of Michael Lewis, his lawyer at the hearing. McDonald had given Lewis's name, address, and telephone number as a reference in his first letter. Lewis recalled that Magistrate Smith had found that interrogatories were not answered, that orders were not obeyed, and that deposition testimony was inaccurate. He also recalled that Magistrate Smith had said that the case was an embarrassment to the judicial system. Most importantly, however, Lewis could not recall Magistrate Smith making the quote at issue.

McDonald's own evidence thus falls short of proving the truth of his allegations and leaves questions as to McDonald's state of mind in communicating an erroneous version of the hearing. When Magistrate Smith's testimony is considered, a reasonable juror could have found, as these jurors did, clear and convincing evidence that McDonald maliciously made a false statement.

Accepting that discovery orders were not complied with, leading to the eventual dismissal of the case and sanctioning of the Plaintiff, those facts fall far short of a judicial officer terming an attorney's conduct "the most reprehensible" he has seen in twenty-five years.

The source and the words used make this a particularly damaging accusation; if Magistrate Smith did not make the statement, McDonald, who was present at the hearing, had no basis for embellishing upon the truth by misquoting the magistrate. The jury obviously believed Magistrate Smith's denial, and the circumstantial evidence is more than sufficient to support a finding of malice. *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (reciting circumstances which support a finding of malice); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643-45 (7th Cir. 1983) (discussing additional circumstances).

McDonald lost a similar credibility battle with respect to issue number 2. This issue concerned David Smith's alleged "fixing" of a DUI charge on behalf of Carl Staley, who, according to McDonald's letter, later received a permanent leg injury from an accident which occurred while Staley was intoxicated. Carl Staley and David Smith testified that Smith never represented Staley on a DUI charge, much less "fixed" one. Although Staley was involved in a 1975 automobile accident, he stated that he had no permanent injury and was not intoxicated at the time.

In contrast, McDonald testified that the "three witnesses" to the "fixing" were himself, his wife, and his former wife. McDonald stated that Staley had related the "fixing" incident to McDonald's former wife in 1975, and repeated it to McDonald and his wife, Catherine, over a business lunch. Catherine McDonald's testimony supported McDonald's version of events. Staley admitted that he had eaten lunch with the McDonalds, but denied that he had ever told them or anyone else that David Smith had "fixed" criminal charges against him.

As with the quote attributed to Magistrate Smith, the jury obviously believed Carl Staley and disbelieved Robert McDonald. Once the jury made this credibility determination and found McDonald's assertion untrue, McDonald's knowledge of falsity or reckless disregard

thereof is easily inferrable. The evidence is again susceptible to the interpretation that McDonald took a kernel of truth and fabricated it into perhaps the most harmful of his accusations. *See St. Amant*, 390 U.S. at 732. Accordingly, the court finds that the jury's verdict on issue number 2 was supported by clear and convincing evidence.

With the propriety of the verdict on issues 1, 2, and 10 thus established, issues 3, 5, 6, 7, and 8 become largely irrelevant.[3] The jury's negative answers to issues 4 and 9 indicate that they understood their instructions and gave each issue careful, individual consideration. With respect to McDonald's most damaging statements, the evidence presented questions of credibility which were resolved against McDonald. The motion for judgment n.o.v. will be denied.

II. *Damages and Remittitur*

A. *Compensatory damages*

To recover compensatory damages exceeding a nominal sum, under North Carolina law a libel plaintiff must prove both the fact and extent of his injuries by a preponderance of the evidence. *R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO*, 270 N.C. 160, 170, 154 S.E.2d 344, 354 (1967); *Jones v. Hester*, 262 N.C. 487, 488, 137 S.E.2d 846, 847 (1964). Com-

[3] Upon reviewing the evidence, the court agrees with the Defendant that the statements which became issues 6 and 7 were substantially true, and serious questions exist as to whether the statements that became issues 3 and 8 were false or were made with malice. As to issue number 5, involving the use of the word "blackmail," the court merely notes that whether this sentence is fact or opinion depends mainly on its context, and the sentence goes on to allege that "thereafter the crucial evidence was withheld." *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970); *Potomac Valve*, 829 F.2d at 1287-88. However, since McDonald's liability is adequately established under issues 1, 2, and 10, the court need not and does not decide these questions.

pensatory damages include: (1) pecuniary loss; (2) physical pain and inconvenience; (3) mental suffering; and injury to reputation. *Roth v. Greensboro News Co.*, 217 N.C. 13, 23, 6 S.E.2d 882, 889 (1940). The jury was so instructed, after which it awarded Smith $50,000.00 in compensatory damages.

In urging the court to remit Smith's compensatory damages to the nominal sum of $1.00, McDonald attacks Smith's proof as to each of the above items. First, he contends that Smith proved no financial harm, since Smith's income after the libel was greater than that of a United States Attorney and since Smith was able to purchase a luxury car. Many of Smith's witnesses testified to his good reputation and high character; therefore McDonald argues Smith proved no reputational harm. Finally, McDonald discounts Smith's physical and emotional injuries because Smith never consulted a doctor nor took medication.

McDonald's arguments ignore much of Smith's evidence regarding his damages. Most importantly, Smith testified that the letters caused him great anger, embarrassment, and humiliation, especially when he discussed them with McDonald's named references to obtain their affirmance or denial. He stated that the process of refuting the letters made him increasingly self-conscious and caused him to lose confidence in himself. Similar proof of embarrassment, humiliation, and psychological effects has sufficed to support a verdict of twice the amount awarded here. *See Time, Inc. v. Firestone*, 424 U.S. 448, 460-61 (1976) (allowing award of $100,000.00 for plaintiff's anxiety and concerns caused by the libel, but vacating judgment of the Florida state court for lack of finding on issue of fault on the defendant's part); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (recognizing personal humiliation and mental anguish as "customary" types of harm). Like the Court in *Time*, this court hs "no warrant" to

reduce arbitrarily the jury's verdict. *Time*, 424 U.S. at 461.

Moreover, Smith testified that the stress and anxiety incident to refuting the letters caused him to sleep poorly and contributed to minor health problems. He also testified that after the letters became known fewer cliens called, and that his earnings decreased from $63,000.00 in 1981 to $39,000.00 in 1982. Finally, Smith established damage to reputation by stating that he hears references to the letters to this day, and that people occasionally stop him and ask him how to "fix" a DUI charge. Smith's failure to seek medical attention and his parade of lawyers testifying to his good character go to the weight, not the substance, of his evidence regarding damages.

The author of a defamation is liable for damages "directly and proximately" caused, including damages from secondary publication if such repetition is the "natural and probable consequence" of his act. *Gillis v. The Great Atlantic & Pacific Tea Co.*, 223 N.C. 470, 476, 27 S.E.2d 283, 287 (1943). Although McDonald mailed his libelous missives only to a few officials, their wider circulation among politicians, eventual discovery by Smith, and Smith's efforts at refutation were probable and foreseeable consequences. Having presented evidence of the resultant mental suffiering, physical inconvenience, financial impact, and injury to reputation, Smith is entitled to compensatory damages as found by the jury.

B. *Punitive damages*

Since both federal and state law recognize that the amount of punitive damages can be excessive, the $150,000.00 assessment of punitive damages is the most troubling issue before the court. After careful consideration of the factors which bear on the appropriateness of punitive damages, the court concludes that any reduction

would constitute the arbitrary substitution of the court's judgment for the jury's. Consequently, the punitive damages shall stand as awarded.

Under North Carolina law, punitive damages may be imposed for libelous statements when the plaintiff proves that the defendant acted with *New York Times* malice. *Ward v. Turcotte*, 79 N.C. App. 458, 461, 339 S.E.2d 444, 447 (1986); *Cochran v. Piedmont Publishing Co., Inc.*, 62 N.C. App. 548, 549, 302 S.E.2d 903, 904, *disc. rev. denied*, 309 N.C. 819, 310 S.E.2d 348 (1983), *cert. denied*, 469 U.S. 816 (1984). Punitive damages "commensurate with the injury" are allowable to punish the defendant for his culpable motives and to deter him and others from similar acts. *Cotton v. Fisheries Products Co.*, 181 N.C. 151, 152-53, 106 S.E. 487, 488 (1921); *Shugar v. Guill*, 304 N.C. 332, 335, 283 S.E.2d 507, 509 (1981). Evidence of the defendant's financial condition is also relevant to this issue. *Roth*, 217 N.C. at 19. Although the decision to award punitive damages, and the amount allowed, rest with the sound discretion of the jury, the amount "may not be excessively disproportionate to the circumstances of contumely and indignity present." *Cotton*, 181 N.C. at 153.

Motivated primarily by first amendment considerations, the federal courts have long expressed a comparable concern with excessive punitive damages in libel cases. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the plaintiff received $25,000.00 in compensatory damages and $725,000.00 in punitive damages; although the latter was reduced $250,000.00 on remittitur, the appellate courts reversed for failure to apply the *New York Times* standard. Seeking only to vacate the award, Justice Harlan opined that the first amendment requires that punitive awards bear a reasonable and purposeful relationship to the actual harm done, with the defendant's resources and the publication's potential for harm also deserving consideration. *Rosenbloom*, 403 U.S. at 75-77

(Harlan, J., dissenting). In the same case, Justice Marshall went so far as to suggest that punitive damages should be eliminated in the libel context. *Rosenbloom*, 403 U.S. at 84 (Marshall, J., dissenting); *compare Curtis Publishing Co. v. Butts*, 388 U.S. 130, 160 (1967) (plurality opinion of Harlan, J.) ($60,000.00 compensatory award and $3,000,000.00 punitive award reduced to total award of $460,000.00 on remittitur; such judicial control adequately serves the constitutional guarantee of freedom of speech).

The Fourth Circuit adopted part of Justice Harlan's test in *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). Appleyard, a public figure, proved malice on the part of a magazine which published articles suggesting his disdamages and $75,000.00 punitive damages, but the trial court cut the punitive award to $5,000.00 by remittitur. The circuit court affirmed, finding that the punitive award, as remitted, was not "excessive in relation to the [article's] potential harm." *Appleyard*, 539 F.2d at 1030. The court noted, however, that an excessive award might present first amendment problems because of its inherent chilling effect on vigorous criticism of public officials. *Id.*; *see also Hudnall v. Sellner*, 800 F.2d 377, 382 (4th Cir. 1986) (although not a first amendment case, the court in affirming a defamation award of $420,000.00 in compensatories and $650,000.00 punitives found excessiveness contention "worrisome"), *cert. denied sub nom. Sellner v. Panagoulis*, 107 S. Ct. 960 (1987).

In sum, state law directs the court to conduct an excessiveness review based on the wealth of the defendant, the injury and indignity present, and the goals of punishment and deterrence. Federal law counsels a constitutionally-grounded examination based upon the libel's harm, actual and potential, and upon the potential chilling effect of the verdict. Applying all of these considera-

tions, the court concludes that the $150,000.00 award is within acceptable limits.

The primary concern here, as it has been throughout the case, is the proper balance between first amendment interests and a citizen's interest in preserving his reputation. The accommodation between these competing values in the *New York Times* standard for liability has continuing relevance in determining that liability's limits. McDonald, even in communicating with the President, enjoys no right to commit libel, *McDonald v. Smith*, 472 U.S. at 485, and "there is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340. The chilling effect of punitive damages is substantially reduced by the hurdle of *New York Times* malice which the Plaintiff had to overcome to reach the jury on this issue. Although the court believes that treble the compensatory damages is perhaps as much as the first amendment can tolerate, under the circumstances of this case it cannot say that such a punitive award is so inherently chilling as to require a remittitur.

Moreover, the actual and potential harm involved here counsel against a court-imposed reduction. Smith's embarrassment, humiliation, emotional distress, and reputational damage are significant. And McDonald's letters, containing damaging accusations which were reinforced by names, dates, and references, had the potential to cause even greater harm. McDonald professed no desire to ruin Smith's career (hence the limtied number of addresses), but a wider circulation was almost inevitable. Although the impact of the letters diminished as numerous references denied the letters' statements, the letters initially appeared credible and few people (aside from Smith and Congressman Johnston, who had recommended him) would have taken, or did take, time to investigate. In view of the letters' troublesome possibilities, tripling the compensatory award is not overly punitive or disproportionate for deterence purposes.

Finally, the minimal evidence regarding McDonald's financial condition does not persuade the court to override the jury's verdict. At trial McDonald testified that he was a college graduate and had held various executive positions before establishing his own business. As the time the letters were written, McDonald owned Colonial Schools, a company which operated three pre-schools in the Middle District and generated $500,000.00 per year in revenue. This evidence, such as it was, suggested a man of some means.

In contrast, McDonald submitted a post-trial affidavit stating that he is unemployable, has $44,000.00 in unpaid legal bills, and owns a single asset with his wife—their home. Even when this post-trial evidence is considered, its credibility is questionable and the court can only guess as to McDonald's true financial situation. *See Hudnall*, 800 F.2d at 383 (upholding punitive damage award when faced with a similar lack of evidence).

The results of an excessiveness review vary with the circumstances of each case. In *Butts* the Supreme Court affirmed a punitive award approximately six and one-half times greater than the compensatory award, whereas in *Appleyard* the Fourth Circuit affirmed punitive damages equal to "only" one-half of the compensatory verdict. *Butts*, 388 U.S. at 161; *Appleyard*, 539 F.2d at 1030. Given the evidence of constitutional and common law malice and potential for harm present in this case, the court cannot say that the jury exceeded its permissible bounds in its punitive damage award.

CONCLUSION

The right to petition one's government for redress of grievances, like other first amendment rights, does not confer immunity on the publication of malicious falsehoods. Since the jury's verdict was consistent with the evidence presented at trial and the law outlined in this

opinion, the court will enter judgment in accordance with that verdict.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

/s/ [Illegible]
United States District Judge

August 12, 1988

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
GREENSBORO DIVISION

Civil No. C-81-475-G

DAVID I. SMITH,

Plaintiff,

v.

ROBERT MCDONALD,

Defendants.

JUDGMENT

[Filed Aug. 25, 1988]

BULLOCK, District Judge

This civil action came on for trial before the court and a jury during the week of May 16, 1988, and the issues having been duly tried and answered by the jury as follows:

Issue #1:

"At a hearing on November 28, 1978, in the Middle District, Greenboro, N.C., presided over by the Honorable Herman Amasa Smith, U.S. Magistrate, re case II C-75-52G, David I. Smith's conduct was stated to be 'the most reprehensible conduct of any attorney to come before me in my 25 years on the bench.' Present at that hearing was Michael J. Lewis, Esq.; 285 Executive Park Boulevard, Winston Salem, N.C. 27103; phone (919) 765-8455."

Question 1(a): Is this statement false? Yes

(Yes or No)

Question 1(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? Yes

(Yes or No)

(Go to Issue #2)

Issue #2:

"We have three witnesses to the 'fixing of a DUI charge filed against Carl R. Staley, 1516 Greenwood Terrace, Burlington, N.C., for a cash payment of $350.00. Thereafter, Staley, while driving intoxicated, had a near fatal auto accident that has left him with a permanent leg disability."

Question 2(a): Is this statement false? Yes

(Yes or No)

Question 2(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? Yes

(Yes or No)

(Go to Issue #3)

Issue #3:

"You will find a newspaper clipping from the Alamance News which indicates the circumstances of the summary imprisonment of Dr. G. E. Koury, without resort to the subpoena power."

Question 3(a): Is this statement false? Yes

(Yes or No)

Question 3(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? Yes

(Yes or No)

(Go to Issue #4)

Issue #4:

"Our corporation alleges criminal contempt by David I. Smith in that when he was attorney for the plaintiff in the above-noted case, he did, in fact, willfully withhold crucial evidence then in his possession that had been ordered to be produced by the court."

Question 4(a): Is this statement false? No

(Yes or No)

Question 4(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? Yes

(Yes or No)

(Go to Issue #5)

Issue #5:

"Defendants, early in the case, refused to pay blackmail solicited by David I. Smith, and thereafter the crucial evidence was withheld."

Question 5(a): Is this statement false? Yes

(Yes or No)

Question 5(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? Yes

(Yes or No)

(Go to Issue #6)

Issue #6:

"Les Burke—Vernon, Vernon, and Wooten
522 South Lexington Avenue
Burlington, NC 27215
(919) 227-8851

Mr. Burke verifies that Smith is a liar."

Question 6(a): Is this statement false? Yes
(Yes or No)

Question 6(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? Yes
(Yes or No)

(Go to Issue #7)

Issue #7:

"Tip Messick—Messick, Messick, and Messick
Wachovia Building
Burlington, NC 27215
(919) 226-2436

Mr. Messick verifies unethical conduct by Smith and had filed a grievance with the North Carolina State Bar, Raleigh, N.C., in 1980."

Question 7(a): Is this statement false? Yes
(Yes or No)

Question 7(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? Yes
(Yes or No)

(Go to Issue #8)

Issue #8:

"Mitchell McIntire
103 West Elm Street
Graham, NC
(919) 228-1341

Mr. McIntire verifies that David Smith has been dishonest in a matter involving false representation of the filing of an 'upset' bid in a property settlement case."

Question 8(a): Is this statement false? Yes
(Yes or No)

Question 8(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? Yes
(Yes or No)

(Go to Issue #9

Issue #9:

"The court record in U.S. Middle District #C75-52G is replete with false statements by David Smith. You are referred to a 'motion to continue', wherein he alleged hardship due to the fact that he was in solo practice and had to attend a conference in Houston. In fact Smith had a partner, co-counsel John B. Patterson, who also signed the complaint. The fact that Patterson continued as counsel of record for 15 months after Smith was dismissed stands as mute evidence of Smith's lie. Additionally on the record, 12/30/75 deposition of C. S. Richardson, Smith stated that C.S.R. had presented him with discovery per the court order of the same date, stated it was at his office, and that he would present it to counsel for defendant without further subpoena. It was never presented and delayed proceedings for nearly 1½ years beyond Smith's dismissal."

Question 9(a): Is this statement false? Yes

(Yes or No)

Question 9(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? No

(Yes or No)

(Go to Issue #10)

Issue #10:

"The above conduct was in part that which U.S. Magistrate Herman Amassa Smith referred (11/28/78) to as 'the most reprehensible conduct of any attorney appearing before me in his 25 years on the bench.' "

Question 10(b): Is this statement false? Yes

(Yes or No)

Question 10(b): If so, was it published with knowledge of its falsity or with reckless disregard of whether it was false or not? Yes

(Yes or No)

(If you answered "yes" and "yes" to questions (a) and (b) under any issue, go on to Issues # 11 and 12. If you answered "no" to either question (a) or question (a) or question (b) in each and all of Issues 1 through 10, stop here and do not go to any other issue.)

Issue #11:

What amount of damages, if any, is the Plaintiff entitled to receive as compensatory damages?

$50,000.00

(Amount)

(Go to Issue #12)

Issue #12:

What amount of damages, if any, is the Plaintiff entitled to recover as punitive damages?

$150,000.00

(Amount)

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the Plaintiff David I. Smith HAVE AND RECOVER of the Defendant Robert McDonald the sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00), and that the costs of this action shall be TAXED to the Defendant Robert McDonald.

/s/ [Illigible]
United States District Judge

August 25, 1988

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
GREENSBORO DIVISION

Civil No. C-81-475-G

DAVID I. SMITH,

Plaintiff,

v.

ROBERT MCDONALD,

Defendants.

ORDER

BULLOCK, District Judge

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that the Defendant's motion for a judgment n.o.v. or, in the alternative, for a new trial is hereby DENIED. The Defendant's motion for remittitur of damages is also DENIED.

/s/ [Illegible]
United States District Judge

August 25, 1988

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. 84-476

ROBERT MCDONALD,
Petitioner

v.

DAVID I. SMITH

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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[June 19, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Petition Clause of the First Amendment provides absolute immunity to a defendant charged with expressing libelous and damaging falsehoods in letters to the President of the United States.

I

In July 1981, respondent commenced a libel action against petitioner in state court under the common law

of North Carolina. Respondent alleged that while he was being considered for the position of United States Attorney, petitioner wrote two letters to President Reagan.[1] The complaint alleges that these letters "contained false, slanderous, libelous, inflammatory and derogatory statements" concerning respondent. App. 4-5. In particular, the complaint states that the letters falsely accused respondent of "violating the civil rights of various individuals while a Superior Court Judge," "fraud and conspiracy to commit fraud," "extortion or blackmail," and "violations of professional ethics." *Id.*, at 5-6. Respondent, alleged that petitioner knew that these accusations were false, and that petitioner maliciously intended to injure respondent by undermining his prospect of being appointed United States Attorney.

The complaint alleges that petitioner mailed copies of the letters to Presidential adviser Edwin Meese, Senator Jesse Helms, Representative W. E. Johnston, and three other officials in the executive and legislative branches.[2] It further alleges that petitioner's letters had their intended effect: respondent was not appointed United States Attorney, his reputation and career as an attorney were injured, and he "suffered humiliation, embarrassment, anxiety and mental anguish." *Id.* at 6. Respondent sought compensatory and punitive damages of $1 million.

Petitioner removed the case to the United States District Court on the basis of diversity of citizenship. He

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[1] The first letter, dated December 1, 1980, was written to Ronald Reagan as "President-Elect of the United States." App. 8. The second letter was dated February 13, 1981, and directed to President Reagan. *Id.*, at 14. Petitioner described himself as a "politically active American" who has owned and operated three child-care centers in North Carolina since 1970. *Id.*, at 8.

[2] Copies of the December 1, 1980, letter were purportedly sent to Representatives Jack Kemp and Barry Goldwater, Jr. The Director of the FBI, William Webster, allegedly received a copy of the letter dated February 13, 1981.

then moved for judgment on the pleadings on the ground that the Petition Clause of the First Amendment provides absolute immunity. The District Court agreed with petitioner that his communications fell "within the general protection afforded by the petition clause." 562 F. Supp. 829, 838-839 (MD NC 1983), but held that the Clause does not grant absolute immunity from liability for libel. The Fourth Circuit, relying on this Court's decision in *White v. Nicholls*, 3 How. 266 (1845), affirmed.[3] 737 F.2d 427 (1984).

We granted certiorari, 469 U.S. —— (1984), and we affirm.

II

The First Amendment guarantees "the right of the people . . . . to petition the Government for a redress of grievances." The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." *Id.*, at 552. And James Madison made clear in the congressional debate on the proposed amendment that people "may communicate their will" through direct petitions to the legislature and government officials. I Annals of Congress 738 (1789).

The historical roots of the Petition Clause long antedate the Constitution. In 1689, the Bill of Rights exacted of William and Mary stated: "[I]t is the Right of the Subjects to petition the King." 1 Wm. & Mary, Sess.

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[3] Because petitioner raised a "serious and unsettled question" concerning absolute immunity, 737 F.2d, at 428, the Court of Appeals accepted jurisdiction under the "collateral order" doctrine. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 (1982). Given the preliminary nature of this appeal, we do not address petitioner's request for attorney's fees should be ultimately prevail.

2, ch. 2. This idea reappeared in the colonies when The Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances. See 1 B. Schwartz, The Bill of Rights—A Documentary History 198 (1971). And the Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances. *See, e.g.*, Pennsylvania Declaration of Rights (1776).

Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel. Early libel cases in state courts provide no clear evidence of the nature of the right to petition as it existed at the time the First Amendment was adopted; these cases reveal conflicting views of the privilege afforded expressions in petitions to government officials.

The plaintiff in the Vermont case of *Harris* v. *Huntington*, 2 Tyler 129 (1802), brought a libel action complaining of the defendant's petition to the legislature that he not be reappointed as a justice of the peace. The court, based on its understanding of "the right of petitioning the supreme power," granted the defendant's request for an "absolute and unqualified immunity from all responsibility." *Id.*, at 139-140. This absolute position of Vermont court reflected an early English view,[4] but was not followed by the courts of other states. See, *e.g.*, *Commonwealth* v. *Clapp*, 4 Mass. 163, 169 (1808). Indeed, Justice Yeates of the Supreme Court of Pennsylvania stated in *Gray* v. *Pentland*, 2 Serg. & R. 23 (1815), that

> "an individual, who *maliciously, wantonly*, and *without probable cause*, asperses the character of a pub-

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[4] See *Lake* v. *King*, 1 Wms. Saund. 131; 85 Eng. Rep. 137 (K.B. 1680). In *White* v. *Nicholls*, 3 How. 266 (1845), this Court described *Lake* v. *King* as a "seemingly anomalous decision." *Id.*, at 289.

> lic officer in a written or printed paper, delivered to those who are invested with the power of removing him from office, is responsible to the party injured in damages, although such paper is masked under the specious cover of investigating the conduct of such officer for the general good. Public policy demands no such sacrifice of the rights of persons in an official capacity, nor will the law endure such a mockery of its justice." *Id.*, at 25 (emphasis in original).

In *White* v. *Nicholls*, 3 How. 266 (1845), this Court dealt with the proper common-law privilege for petitions to the Government. The plaintiff in *White* brought a libel action based on letters written by Nicholls urging the President of the United States to remove him from office as a customs inspector. The Court, after reviewing the common law, concluded that the defendant's petition was actionable if prompted by "express malice," which was defined as "falsehood and the absence of probable cause." *Id.*, at 291. Nothing presented to us suggests that the Court's decision not to recognize an absolute privilege in 1845 should be altered; we are not prepared to conclude, 140 years later, that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right.[5]

Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute. For example, filing a complaint in court is a form of petitioning activity; but "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restau-*

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[5] Basic aspects of the right to petition were under attack in England in the 1790's. In response to an assembly of 150,000 persons petitioning for various reforms, Parliament outlawed public meetings of more than 50 persons held to petition the King, "except in the presence of a magistrate with authority to arrest everybody present." I. Brant, The Bill of Rights 245 (1965).

rants, Inc. v. *NLRB*, 461 U.S. 731, 743 (1983); accord, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972). Similarly, petitions to the President that contain intentional and reckless falsehoods "do not enjoy constitutional protection," *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964), and may, as in *White* v. *Nicholls*, *supra*, be reached by the law of libel.

To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. See *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222 (1967). These First Amendment rights are inseparable, *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945), and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

III

Under state common law, damages may be recovered only if petitioner is shown to have acted with malice; "malice" has been defined by the Court of Appeals of North Carolina, in terms that court considered consistent with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), as "knowledge at the time that the words are false, or . . . without probable cause or without checking for truth by the means at hand." *Dellinger* v. *Belk*, 34 N.C. App. 488, 490, 238 S.E. 2d 788, 789 (1977). We hold that the Petition Clause does not require the State to expand this privilege into an absolute one. The right to petition is guaranteed; the right to commit libel with impunity is not. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE POWELL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 84-476

ROBERT MCDONALD,

Petitioner

v.

DAVID I. SMITH

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

[June 19, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964), held that a public official may recover damages for a false statement concerning his official conduct only where the statement was "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." This standard, explicitly directed toward protection of "freedom of speech and of the press," *id.*, at 264, reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *id.*, at 270.

The petitioner Robert McDonald contends that when a citizen communicates directly with government officials about matters of public importance—here the qualifica-

tions of a candidate for United States Attorney—the First Amendment's Petition Clause requires courts in defamation actions to accord an *absolute* privilege to such communications rather than the qualified privilege defined in *New York Times*. I fully agree with the Court that the Petition Clause imposes no such absolute privilege.

McDonald correctly notes that the right to petition the government requires stringent protection. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U. S. 542, 552 (1876). The right to petition is "among the most precious of the liberties guaranteed by the Bill of Rights," *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222 (1967), and except in the most extreme circumstances citizens cannot be punished for exercising this right "without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions," *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). As with the freedoms of speech and press, exercise of the right to petition "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," and the occasionally "erroneous statement is inevitable." *New York Times Co.* v. *Sullivan, supra*, at 270-271. The First Amendment requires that we extend substantial " 'breathing space' " to such expression, because a rule imposing liability whenever a statement was accidently or negligently incorrect would intolerably chill "would-be critics of official conduct . . . from voicing their criticism." 376 U.S., at 272, 279.[1]

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[1] To safeguard the First Amendment's values, "defeasance of the privilege" set forth in *New York Times* "is conditioned, not on mere negligence, but on reckless disregard for the truth." *Garrison* v. *Louisiana*, 379 U.S. 64, 79 (1964).

We have not interpreted the First Amendment, however, as requiring protection of *all* statements concerning public officials.

> "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even to topple an administration. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964).

McDonald argues that, for two reasons, this qualification of the right vigorously to criticize public officials should not apply to expression falling within the scope of the Petition Clause.[2] First, he contends that petition-

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[2] For purposes of applying an absolute immunity in the Petition Clause context, McDonald suggests that we need consider only those expressions that "touc[h] on" and are "relevant to" the official conduct of public servants, and that are "contained in a private peti-

ing historically was accorded an absolute immunity and that the Farmers included the Petition Clause in the First Amendment on this understanding. I agree with the Court that the evidence concerning 17th and 18th century British and Colonial practice reveals, at most, "conflicting views of the privilege afforded expressions in petitions to government officials," *ante*, at 6, and does not persuasively demonstrate the Framers' intent to accord absolute immunity to petitioning.

Second, McDonald argues that criticism of public officials under the Petition Clause is functionally different from, and therefore entitled to greater protection than, criticism of officials falling within the protection of the First Amendment's Speech and Press Clauses. Specifically, he contends that "[*u*]*nlike the more general freedoms of speech and press*, the right to petition was understood by the Framers of the Constitution and the First Amendment to be a necessary right of a self-governing people," and that "when the citizen is not speaking to the public at large, but is directly exercising his right to petition, [he] is thus performing a self-governmental function." Brief for Petitioner 7, 30 (emphasis added). Such a distinction is untenable. The Speech and Press Clauses, every bit as much as the Petition Clause, were included in the First Amendment to ensure the growth and preservation of democratic self-governance.

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tion to federal officials who [have] authority to take responsive actions." Brief for Petitioner 7, and n. 7. The Court long ago concluded, however, that the Petition Clause embraces a much broader range of communications addressed to the executive, the legislature, courts, and administrative agencies. See, *e.g.*, *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). It also includes such activities as peaceful demonstrations. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 909-912 (1982); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963). Expression falling within the Petition Clause will thus frequently also be protected by the First Amendment freedoms of speech, press, and assembly. See also *Adderley* v. *Florida*, 385 U.S. 39, 49-51 (1966) (Douglas, J., dissenting).

A citizen who criticizes a public official is shielded by the Speech and Press Clauses because "[i]t is as much his *duty* to criticize as it is the official's duty to administer." *New York Times Co.* v. *Sullivan*, 376 U.S., at 282 (emphasis added). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, *supra*, at 74-75.[3]

The Framers envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public's exercise of its sovereign authority. As Representative James Madison observed during the House of Representatives' consideration of the First Amendment:

> "The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; *in all these ways they may communicate their will.*" 1 Annals of Cong. 738 (1789) (emphasis added).

The Court previously has emphasized the essential unity of the First Amendment's guarantees:

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . . and there-

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[3] Thus the advertisement at issue in *New York Times*, every bit as much as the letter to President Reagan at issue here, "communicated information, expressed opinion, recited grievances, [and] protested claimed abuses"—expression essential "'to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.'" *New York Times Co.* v. *Sullivan*, 276 U.S., at 266, 269.

> fore are united in the First Article's assurance." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

And although we have not previously addressed the precise issue before us today, we have recurrently treated the right to petition similarly to, and frequently as overlapping with, the First Amendment's other guarantees of free expression. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 909-912, 915 (1982); *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S., at 221-222; *Adderley* v. *Florida*, 385 U.S. 39, 40-42 (1966); *Edwards* v. *South Carolina*, 372 U.S. 229, 234-235 (1963); *NAACP* v. *Button*, 371 U.S. 415, 429-431 (1963).

There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States. It necessarily follows that expression falling within the scope of the Petition Clause, while fully protected by the actual-malice standard set forth in *New York Times Co.* v. *Sullivan*, is not shielded by an absolute privilege. I therefore join the Court's opinion.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 83-1509

DAVID I. SMITH,

Appellee,

v.

ROBERT MCDONALD,

Appellant.

Argued Jan. 11, 1984

Decided June 28, 1984

Bruce J. Ennis, Washington, D.C. (Geoffrey P. Miller, Kit Kinports, Ennis, Friedman, Bersoff & Ewing, Washington, D.C., McNeill Smith, H. Miles Foy, III, Smith, Moore, Smith, Schell & Hunter, Greensboro, on brief), for appellant.

Henry Blinder, Durham, N.C. (B.F. Wood, Latham, Wood & Abernathy, Graham, N.C., on brief), for appellee.

Before RUSSELL and WIDENER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

Robert McDonald, asserting absolute privilege as a defense to an action for libel, appeals from an order denying his motion for judgment on the pleadings. We affirm.

McDonald sent two letters to the President of the United States, with copies to several people in his ad-

ministration and members of Congress, suggesting that David I. Smith, who was seeking appointment as United States Attorney in North Carolina, was not fit for the position. After the President declined to appoint him, Smith filed a libel action in state court alleging that McDonald's letters to the President contained "false, slanderous, libelous, inflammatory, and derogatory statements" and that McDonald had composed the letters maliciously and with evil intent.

McDonald removed the action to federal court on the basis of diverse citizenship. He then filed a motion for judgment on the ground that his letters were absolutely privileged under the petition clause of the first amendment and the appointments and speech or debate clauses of the United States Constitution. The district court denied the motion, ruling that McDonald was entitled only to the defense of qualified privilege.[1]

I

The first issue, which Smith has raised by a motion to dismiss, is whether the district court's order is appealable.

In *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); *Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979); and *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), interlocutory orders denying absolute immunity were appealable because they satisfied the criteria for collateral orders explained in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).[2] Tested by the principles explained in these cases, the order denying McDonald's defense of absolute

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[1] *Smith v. McDonald*, 562 F. Supp. 829 (M.D.N.C. 1983).

[2] *See also Chavez v. Singer*, 698 F.2d 420 (10th Cir. 1983); *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979); *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1984) (dicta).

immunity is appealable. It is a final disposition of a claimed right which is independent from the subject matter of the libel action. It resolves an issue that cannot be effectively reveiwed after final judgment. Deferral would defeat McDonald's claim that he should not be put to trial, which is the initial protection of absolute privilege. Finally, the nature of the privilege that protects conduct arising under the petition clause presents a serious and unsettled question because other courts have concluded that a petitioner is entitled to absolute privilege.[3]

II

The first amendment provides: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." The issue raised by the motion for judgment on the pleadings is whether the petition clause affords McDonald a complete defense even if, as alleged in the complaint, his letters to the President were false and malicious. Resolution of this issue depends on whether the petition clause creates an absolute privilege or a qualified privilege. The appointments and speech or debate clauses neither add to nor detract from McDonald's defense, and they are not germane to this issue.

In agreement with the district court, we conclude that this case is governed by *White v. Nicholls*, 44 U.S. (3 How.) 266, 11 L.Ed. 591 (1845). Nicholls and others wrote several letters to the President and to the Secretary of the Treasury protesting that White was unfit to serve as collector of customs. After White was replaced by one of his critics, he brought suit aganst his detractors, alleging that the letters to the President and the Secretary were false and maliciously composed. The trial court, however, ruled that the letters were inadmis-

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[3] *See, e.g., Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Sherrard v. Hull*, 456 A.2d 59, 53 Md. App. 553 (1983); *Webb v. Fury*, 282 S.E.2d 28 (W.Va. 1981).

sible, and the jury consequently returned a verdict against White.

In the Supreme Court, the authors sought to uphold the trial court's exclusion of their letters on the ground that they were privileged communications. They argued that the letters were sent to the President to obtain White's removal and that this was a "perfectly constitutional proceeding." 3 How. at 283.

The Supreme Court rejected the arguments advanced by the letter writers, reversed the judgment, and remanded the case for a new trial at which the letters should be admitted in evidence. Although the Court did not expressly advert to the first amendment, it recognized that the letters were privileged communications because they were petitions to an appropriate authority for redress of grievances. After canvassing English and American common law authorities, the Court held that the privilege arising from the right to petition was subject to "well-defined qualifications." 3 How. at 287. It went on to explain that the presumption of malice that ordinarily attends the publication of defamatory words must give way to the privilege. Consequently, to recover damages, the complainant must prove that the petitioner acted with express malice. 3 How. at 291. The Court disapproved of an English case that held a false petition was not actionable. 3 How. at 289.

The Court's reasoning in *White v. Nicholls* rests on common law and not on an explicit construction of the petition clause. This, however, does not render it inappropriate for our consideration. The right to petition secured by the first amendment was known to the common law. But the amendment does not define the privilege that protects the exercise of this right. To determine the nature of this privilege recourse to the common law is proper. *See Ex Parte Grossman*, 267 U.S. 87, 108-09, 45 S.Ct. 332, 333, 69 L.Ed 527 (1925). Fur-

thermore, although *White v. Nicholls* dealt with an office holder, the Court said that the important issue under inquiry encompassed applicants for office. 3 How. at 285. The Court has declined to follow dicta in *White v. Nicholls* about the privilege accorded witnesses,[4] but the case has not been overruled.

Guided by principles the Court explained in *White v. Nicholls*, we conclude that the district court properly ruled that McDonald was not entitled to the defense of absolute privilege. *Accord Windsor v. The Tennessean*, 719 F.2d 155 (6th Cir. 1983). The result we reach is consistent with *Bradley v. Computer Sciences Corp.*, 643 F.2d 1029, 1033 (4th Cir. 1981), where we held that the petition clause affords a qualified privilege. In that case, however, we had no occasion to discuss whether the privilege was absolute. *See also Restatement (Second) of Torts* § 598 (1977).

McDonald cites a number of cases that support his claim of absolute privilege.[5] We are not persuaded by these authorities. They do not attempt to distinguish *White v. Nicholls* rationally. Instead, they rely primarily on *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

The *Noerr-Pennington* defense rests on the proposition: "Joint efforts to influence public officials do not violate

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[4] *See Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 1114 n.12, 75 L.Ed.2d 96 (1983), where the Court also made the following comment about the specific issue decided in *White v. Nicholls*:

> The plaintiff sought damages for defendants' allegedly defamatory assertions in a petition to the President of the United States requesting the plaintiff's removal from office as a customs collector, a statement entitled at most to a qualified privilege.

[5] *See* note 3, *supra*.

the antitrust laws even though intended to eliminate competition." 381 U.S. at 670, 85 S.Ct. at 1593. The defense is based on the Court's perception that Congress did not intend by enactment of antitrust legislation to bar concerted exercise of the right to petition. In reaching this conclusion, the Court found no occasion to depart from the principle of *White v. Nicholls*, or even to cite that case. Indeed, the cases are not inconsistent. *White v. Nicholls* does not purport to bar the right to petition; instead, it clothes that right with significant protection.

White v. Nicholls affirmed the common law precept that the right to petition can be abused by malice. The penalty is loss of the privilege. 3 How. at 289, 291. We do not perceive that this aspect of the case was implicitly overruled by *Noerr-Pennington*. The Court recognized that the *Noerr-Pennington* doctrine was itself subject to abuse by sham. 365 U.S. at 144, 81 S.Ct. at 533. When this is proved, the defense fails. *See California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 511-16, 92 S.Ct. 609, 612-14, 30 L.Ed.2d 642 (1972). If one equates sham with malice, each in its proper context, the error of concluding that *Noer-Pennington* implicitly has overruled *White v. Nicholls* is readily exposed.

AFFIRMED.

APPENDIX G

UNITED STATES DISTRICT COURT
M.D. NORTH CAROLINA
GREENSBORO DIVISION

Civ. A. No. C-81-475-G

DAVID I. SMITH,

Plaintiff,

v.

ROBERT MCDONALD,

Defendant.

April 28, 1983

B.F. Wood, Latham, Wood & Abernathy, Graham, N.C., for plaintiff.

Bruce J. Ennis and Geoffrey P. Miller, Ennis, Friedman, Bersoff & Ewing, Washington, D.C., McNeill Smith and H. Miles Foy, III, Smith, Moore, Smith, Schell & Hunter, Greensboro, N.C., for defendant.

MEMORANDUM OPINION

BULLOCK, District Judge.

David I. Smith, a citizen of the State of North Carolina, filed this action for libel in the North Carolina General Court of Justice, Superior Court Division of Alamance County, on July 24, 1981. The complaint alleges that, following the general election of 1980, Smith applied for the position of United States Attorney for the Middle District of North Carolina and that he was be-

ing "seriously considered" for such position by the relevant authorities. Smith's cause of action is based upon two letters written by the Defendant, Robert McDonald, and sent by him to the President of the United States, Ronald Reagan, urging the President not to appoint Smith as United States Attorney. Copies of the letters were also allegedly mailed by McDonald to several members of Congress, to Edwin Meese, Chief Counselor to the President and Chairman of the Transition Team, and to William Webster, Director of the Federal Bureau of Investigation.

The complaint states that McDonald composed the letters "wilfully and maliciously and with evil and wicked intent." Smith also alleges that the letters contain:

> [F]alse, slanderous, libelous, inflamatory [sic] and derogatory statements and allegations of and concerning the plaintiff . . . that the defendant knew . . . were false and untrue and that same were made with the specific and malicious intent to harm the plaintiff in his personal life and in his profession as an attorney . . . and for the further express and malicious purpose of harming and damaging the plaintiff's application and chances to be appointed as the United States Attorney for the Middle District of North Carolina.

Complaint, ¶ 5.

Smith was not selected by the President to serve as U.S. Attorney and thereafter commenced this action in state court. On August 25, 1981, McDonald petitioned for removal to this court pursuant to 28 U.S.C. § 1441. In the petition McDonald argued that he was a citizen of the Commonwealth of Virginia on the date this action was filed and that, therefore, the court had original diversity jurisdiction over the subject matter. *See* 28 U.S.C. § 1332.

On September 24, 1981, McDonald moved pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. The motion was based upon McDonald's contention that communications made to an appointing authority regarding the character and qualifications of a candidate for public office are entitled to an absolute privilege under the common law. On October 2, 1981, Smith filed a motion to remand the case to state court on the grounds that McDonald was a citizen of the state of North Carolina and the date the action was commenced. Both McDonald's motion to dismiss and Smith's motion to remand were denied by the Honorable Eugene A. Gordon, United States District Judge for the Middle District of North Carolina, by order dated March 19, 1982.

The matter currently before the court is McDonald's motion for judgment on the pleadings. Fed.R.Civ.P. 12(c), filed along with his answer on August 9, 1982. The crux of McDonald's argument rests upon his contention that the conduct with which he is charged by Smith is absolutely privileged under the "petition" clause of the first amendment of the Constitution of the United States. Restricting its consideration solely to the constitutional issues addressed by the parties,[1] the court determines that McDonald is entitled to only a qualified privilege

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[1] This case apparently involves a North Carolina plaintiff who sought a Presidential appointment to a job in North Carolina and a Virginia defendant who allegedly composed libelous letters while living in North Carolina. The letters were then sent to Washington, D.C., to the Office of the President, other executive branch officials, a Congressman from California, and Congressmen from North Carolina. Hidden somewhere within this scrambled factual scenario is a troublesome question concerning choice of law. The court specifically does not now decide that question since it has not yet been fully developed factually nor briefed by the parties. However, resolution of the conflicts issue is mooted to the extent the court finds that the elements Smith must establish to recover are dictated by the first amendment.

under the first amendment and that his motion for judgment on the pleadings must therefore be denied.

I. COMMON LAW ELEMENTS OF AN ACTION FOR LIBEL

In order to consider McDonald's claim of constitutionally-based "privilege," the court finds it necessary to review the elements of an action for libel in conjunction with the common law defense of "privilege." For guidance, the court turns to decisions by the North Carolina courts.

A libel, as applied to individuals, as a malicious publication expressed either in printing or writing or by sign or picture tending to blacken the memory of one dead or the reputation of one alive and to expose him to public hatred, contempt, or ridicule. *Davis v. Askin's Retail Stores, Inc.*, 211 N.C. 551, 191 S.E. 33, 34 (1937). To constitute a "publication" of allegedly defamatory matter, it is necessary that some third person understand the defamatory matter. *Wright v. Commercial Credit Co.*, 212 N.C. 87, 192 S.E. 844, 845 (1937). Letters written to public officials commenting on the fitness of subordinates have been found to constitute "publication" for purposes of maintaining an action for libel. *Angel v. Ward*, 43 N.C.App. 288, 258 S.E.2d 788 (1979); *Ponder v. Cobb*, 257 N.C. 281, 126 S.Ed.2d 67 (1962); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Ramsey* v. *Cheek*, 109 N.C. 270. 13 S.E. 775 (1891). *Also see White v. Nicholls*, 44 U.S. (3 How.) 266, 11 L.Ed. 591 (1845).

Defamatory matter, written or printed may be libelous and actionable *per se*, without any allegation of special damages, if it tends to expose the plaintiff to "public hatred, contempt, ridicule, aversion, or disgrace and to induce an evil opinion of him in the minds of right thinking persons . . . ." *Flake v. Greensboro News Co.*,

212 N.C. 780, 195 S.E. 55, 60 (1938).[2] To be libelous *per se*, defamatory words must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party. Publications are to be taken in the sense which is most obvious and natural and according to the ideas they are calculated to convey.[3]

Under the common law, privilege is a question of law to be determined by the courts. *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 182 S.E.2d 410, 414 (1971); *Hartsfield v. Harvey C. Hines Co.*, 200 N.C. 356, 157 S.E. 16, 19 (1931); *Gattis v. Kilgo*, 140 N.C. 106, 52 S.E. 249, 250 (1905). Privilege is determined primarily by the occasion and circumstances under which the statement is made. *Stewart v. Nation-Wide Check Corp.*, 182 S.E.2d at 415. Privileged communications may be either "absolutely privileged" or "qualifiedly privileged." *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891).

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[2] Under North Carolina law, there are two other classes of libel besides libel *per se*. The first of these includes publications susceptible of two interpretations, one of which is defamatory and the other not. The second class, termed libel *per quod*, involves publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances becomes libelous. In an action upon the first class it is for the jury to determine whether the publication was defamatory and was so understood by those who saw it. In publications which are libelous *per quod*, the innuendo and special damages must be alleged and proved. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E.2d 452, 455 (1979).

[3] *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55, 60 (1938). In *Flake*, the Supreme Court of North Carolina identified the cases where publications had been held libelous *per se* by North Carolina courts. "The decisions in this jurisdiction, as well as others, clearly establish that a publication is libelous per se, or actionable per se, if when considered alone without innuendo: (1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace; or (4) it tends to impeach one in his trade or profession." *Id.*

In the state of North Carolina, when a court determines that a publication is actionable *per se* the law presumes malice and the burden is on the defendant to show that his charge is true. But in a case of absolute privilege no action can be maintained, even though it can be shown that the charge was both false and malicious. In a case of qualified privilege, an action may be maintained if the plaintiff can prove both the falsity of the charge and that it was made with actual malice. *Hartsfield v. Harvey C. Hines Co.*, 157 S.E. at 19; *Newberry v. Willis*, 195 N.C. 302, 142 S.E. 10 (1928); *Bird v. Hudson*, 113 N.C. 203, 18 S.E. 209, 210 (1893).

Absolute privilege has been confined "by general agreement" to only those situations "where there is an obvious policy an favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives." PROSSER, LAW OF TORTS, § 114 (4th ed. 1971). In the state of North Carolina, absolute privilege has been limited to "words used in debate in [C]ongress and the state legislatures, reports of military or other officers to their superiors in the line of duty, everything said by a judge on the bench, by a witness in the box, and the like." *Ramsey v. Cheek*, 13 S.E. at 775. *Also see Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860, 866 (1957); *Jarman v. Offutt*, 239 N.C. 468, 80 S.E.2d 248, 251 (1954); *Mitchell v. Bailey*, 222 N.C. 757, 23 S.E.2d 829 (1943). The privilege attending communications made in the course of judicial proceedings has been extended to communications in an administrative proceeding where the administrative officer or agency is acting in a judicial or quasi-judicial function. *Angel v. Ward*, 43 N.C.App. 288, 258 S.E.2d 788, 792 (1979); *Mazzucco v. Board of Medical Examiners*, 31 N.C.App. 47, 228 S.E.2d 529, 532, *appeal dismissed*, 291 N.C. 323, 230 S.E.2d 676 (1976).

Under the common law of North Carolina, communications to public officials regarding the fitness of subordinates for public office are entitled to only a qualified

privilege. *Angel v. Ward*, 43 N.C.App. 288, 258 S.E.2d 788 (1979); *Dellinger v. Belk*, 34 N.C.App. 488, 238 S.E.2d 788 (1977); *dis. rev. denied*, 294 N.C. 182, 241 S.E.2d 517 (1978); *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891). In such cases, the plaintiff can therefore recover only if he can prove the malicious intent of the defendant and the falsity of the statements. *Angel v. Ward*, 258 S.E.2d at 791; *Dellinger v. Belk*, 238 S.E.2d at 789; *Ponder v. Cobb*, 126 S.E.2d at 80; *Alexander v. Vann*, 104 S.E. at 361; *Ramsey v. Cheek*, 13 S.E. at 775.

Were the instant case governed solely by the common law, McDonald would be clearly entitled to only a qualified privilege.

II. CONSTITUTIONAL ISSUES

The first amendment to the United States Constitution states that: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S.C.A. Const.Amend. I. The first amendment thus expressly protects the right of the people to petition the government for a redress of grievances. That right, the Supreme Court has stated is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967).

McDonald contends that he is entitled to an absolute privilege under the "petition" clause based primarily upon two Supreme Court decisions interpreting the relationship between that clause and the Sherman Act. 15 U.S.C. § 1, *et seq. See Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81

S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, L.Ed.2d 626 (1965). Before directly addressing the argument advanced by McDonald, the court finds it necessary to consider additional Supreme Court precedents it deems relevant.

Prior to the enactment of the fourteenth amendment to the Constitution, the first eight amendments clearly did not apply to the states. *Barron v. Baltimore*, 32 U.S. (7 Peters) 242, 8 L.Ed. 672 (1833). As late as 1875 the Supreme Court concluded that the first amendment "like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the state government in respect to their own citizens, but to operate upon the National government alone." *United States v. Cruikshank*, 92 U.S. (II Otto) 542, 552, 23 L.Ed. 588 (1875).

Despite this historical precedent, by 1925 the Supreme Court determined that the first amendment freedoms of speech and the press were among the fundamental personal rights and liberties protected by the due process clause of the fourteenth amendment from impairment by the states. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138 (1925). Under current constitutional precedent "[t]here is no longer any doubt" that the freedoms guaranteed by the first and fourteenth amendments are secured to all persons against abridgment by the States. *NAACP v. Button*, 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1961); *also see Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).[4]

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[4] The court is unable to determine whether the first amendment applies to the states under the theory of substantive due process, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138 (1925), or because the framers of the fourteenth

Turning more directly to the merits of the case before the court, it is important to observe that the Constitution of the United States guarantees first amendment freedoms "only against abridgment by government, federal or state. *Hudgents v. NLRB*, 424 U.S. 507, 513, 96 S.Ct. 1029, 1033, 47 LEd.2d 196 (1976). It could thus be reasonably argued that first amendment principles, though clearly applicable to state governments under current standards, warrant no consideration in a case concerning a civil lawsuit between private parties. This argument was rejected by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964). In that case, the plaintiff, an elected official of the City of Montgomery, Alabama, had brought a common law action for libel against defendants who had paid for and published an allegedly libelous advertisement in the New York *Times* newspaper. The relevant state law was similar to that followed in the state of North Carolina to the extent that malice and falsity were presumed upon a finding by the trial judge that the advertisement was libelous *per se*. The defendants argued that the application of the presumption of malice by the state court deprived them of their first amendment right to comment upon the conduct of public officials. *New York Times v. Sullivan*, 376 U.S. at 262, 84 S.Ct. at 716. In finding sufficient state action to apply the requirements of the fourteenth amendment, the Court stated that:

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amendment, "intended . . . to make the Bill of Rights, applicable to the states." *Adamson v. California*, 332 U.S. 46, 71-72, 67 S.Ct. 1672, 1686, 91 L.Ed. 1903 (1949) (Black, J., dissenting). The court would note that the historical basis for the so-called "incorporation" theory, set out by Justice Black in his dissent in *Adamson*, has come under renewed scholarly attack. *See* R. Berger, *Government by Judiciary* (1977); *also see* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949). *But see* Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 Ohio St. L.J. 89 (1982).

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute [citations]. The test is not the form in which state power has been applied, but, whatever form, whether such power has in fact been exercised. *See Ex parte Virginia*, 100 U.S. 339, 346-347 [23 L.Ed. 676], *American Federation of Labor v. Swing*, 312 U.S. 321 [61 S.Ct. 568, 85 L.Ed. 855].

New York Times v. Sullivan, 376 U.S. at 265, 84 S.Ct. at 718.

The first amendment, thus applies to common law actions for libel where application by a court of a state rule of law would result in unlawful restrictions on the constitutional rights of the defendants. *Id.*

McDonald agrees that he would be entitled to only a qualified privilege if the only first amendment interests at stake were his right to free speech. Under the *New York Times* standard, the first amendment requires that in libel actions brought by public officials the plaintiff must prove that the defendant published a defamatory statement with actual malice. *New York Times v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-726. Actual malice was defined by the Court as knowledge of falsity or reckless disregard of the truth. *Id.* Malice cannot be presumed on the grounds that the words are libelous *per se*. *Id.* at 283, 84 S.Ct. at 727. Malice must instead be proven by evidence of "convincing clarity." *Id.* at 285, 286, 84 S.Ct. at 728, 729; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52, 91 S.Ct. 1811, 1824, 29 L.Ed.2d 296 (1971). *Also see Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation*

Actions Through Application of the Noerr-Pennington Doctrine, 31 Am.U.L.Rev. 147, 150 (1981).

The defendants in *New York Times* argued that Alabama law imposed invalid restrictions on only their constitutional freedoms of speech and press. *New York Times v. Sullivan*, 376 U.S. at 265, 84 S.Ct. at 718. McDonald argues, and the court agrees, that decisions interpreting the "speech" clause of the first amendment do not necessarily control cases concerning the "petition" clause. For, as Chief Justice Marshall once stated, "It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174, 2 L.Ed. 60 (1803).

Though McDonald contends that this court is not bound by Supreme Court decisions concerning the "speech" clause of the first amendment, he is unable to cite any decisions by that Court where the relationship between the "petition" clause and actions for libel is discussed directly or by implication. Instead, McDonald seeks to have this court find his communications absolutely privileged based upon Supreme Court cases interpreting the relationship between the petition clause and the Sherman Act. 15 U.S.C. § 1 *et seq.* For the reasons hereafter discussed, the court finds that McDonald's reliance on those decisions is misplaced.

In *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, S.Ct. 523, 5 L.Ed.2d 464 (1961), a group of trucking companies and their trade associations brought suit primarily against a group of railroads, for conspiring to restrain trade in and monopolizing the long-distance freight business in violation of §§ 1 and 2 of the Sherman Act.[5] The truck-

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[5] The relevant provisions respectively state:

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal. Every contract, combination in the form of trust or otherwise, or

ing companies alleged that railroads had conducted a publicity campaign against the trucking industry in order to foster the "adoption and retention of laws and law enforcement practices destructive to the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationship existing between the truckers and their customers." *Noerr*, 365 U.S. at 129, 81 S.Ct. at 525. The Supreme Court rejected the truckers' contention that the Sherman Act's sanctions against combinations in restraint of trade and monopolies applied to the activities engaged in by the railroads, which the Court characterized as "group solicitation of government action." 365 U.S. at 139, 81 S.Ct. at 530. The Court stated that:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Noerr, 365 U.S. at 139, 81 S.Ct. at 530.

The Court in *Noerr* observed that the evidence indicated that the publicity campaign "deliberately deceived the public and public officials." 365 U.S. at 145, 81 S.Ct. at 533.[6] However, the Court concluded that the Sherman

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> conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal . . . .
>
> 15 U.S.C. § 2. Monopolizing trade a felony. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several states, or with foreign nations, shall be deemed guilty of a felony . . . .

[6] The "deception" referred to by the Court did not concern libelous allegations made against the truckers, but instead involved the tactics used by the railroads in conducting their publicity campaign. "[T]he publicity matter in the campaign was made to

Act was not violated by "campaigns to influence legislation and law enforcement." *Id.*

In *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), an independent coal company charged the United Mine Workers and certain coal companies with conspiring to restrain and to monopolize interstate commerce, in violation of §§ 1 and 2 of the Sherman Act. The plaintiff alleged that defendants had lobbied the Secretary of Labor and to raise wage determinations under the Walsh-Healey Act and had also urged the Tennessee Valley Authority to curtail its "spot market" purchases of coal, a substantial portion of which was exempt from the Walsh-Healey wage determination. The plaintiff claimed that the ultimate purpose of defendants' lobbying efforts was to eliminate competition by driving smaller companies, unable to pay Walsh-Healey wage rates, out of business. *Pennington*, 381 U.S. at 659-61, 85 S.Ct. at 1587-1588.

In concluding that the UMW and the defendant coal companies were immune from Sherman Act liability, the Supreme Court determined that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of *intent or purpose.*" 381 U.S. at 670, 85 S.Ct. at 1593 (emphasis added). More specifically the Court stated that "[j]oint efforts to influence public officials do not violate the anti-trust laws even though *intended to eliminate competition.*" *Id.* (emphasis added).

McDonald argues that writing a letter to the President concerning the fitness of a candidate for United States

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appear as spontaneously expressed views of independent persons and civic groups, when, in fact, it was largely . . . paid for by the railroads." *Noerr*, 365 U.S. at 130, 81 S.Ct. at 525. Though the defendants were shielded from anti-trust liability, despite their deception regarding the staging of the publicity campaign, it does not necessarily follow that the same defendants would be immune from tort liability if during the course of the campaign they published charges about their competitors they knew to be false.

Attorney falls within the category of activity protected by the petition clause. McDonald further reasons that *Noerr-Pennington* insulates any type of conduct that can be characterized as petitioning activity not only from the Sherman Act, but all other types of civil liability.

Addressing first McDonald's second contention, the court determines that the Defendant has misread the scope of the *Noerr-Pennington* rulings. In both cases, the Supreme Court was called upon to construe the congressional intent behind the Sherman Act in light of a possible conflict with the constitutionally-protected right to petition the government.[7] As this court interprets those rulings, it finds that the Supreme Court ruled only that Congress did not intend to regulate through the Sherman Act combinations to influence government decisionmakers by publicity campaigns, lobbying, or the use of the channels and procedures of state and federal agencies,[8] even where the *intentions and purposes* of those involved in the combinations are *anti-competitive and monopolistic*.

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be

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[7] The Supreme Court in *Noerr* clearly determined that adopting the interpretation of the Sherman Act offered by the plaintiffs in the case could cause a possible conflict with the first amendment. "[S]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Noerr*, 365 U.S. at 137, 138, 81 S.Ct. at 529, 530.

[8] *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972).

> brought within the general proscription of 'combination[s] . . . in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or an implied agreement or understanding that the participants will jointly give up their trade freedom or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements . . . . [A]nd we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

Noerr, 365 U.S. at 136, 137, 81 S.Ct. at 528, 529.

Though the court rejects McDonald's interpretation of the *Noerr-Pennington* decisions, it does conclude that the defendant's alleged conduct falls within the general protection afforded by the petition clause of the first amendment. For guidance, the court has reviewed decisions by the Supreme Court concerning libel actions arising out of the District of Columbia. The District was created by Congress by the Act of July 16, 1790, I Stat. 130. All subjects of legislation within the District must therefore be consistent with the Constitution of the United States. *District of Columbia v. Thompson Co.*, 346 U.S. 100, 104, 105, 73 S.Ct. 1007, 1009, 1010, 97 L.Ed. 1480 (1953). The federal protections afforded citizens of the several states through the fourteenth amendment, as it is construed today, have therefore always been directly available to the citizens of the District through operation of the Bill of Rights. *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). *Also see Gertz*

v. Robert Welch, Inc., 418 U.S. 323, 380-84, 94 S.Ct. 2997, 3027-3028, 41 L.Ed.2d 789 (1974) (White, J., dissenting).

The court's review of District of Columbia cases has been enlightening. In *White v. Nicholls*, 44 U.S. (3 How.) 266, 11 L.Ed. 591 (1845), the defendants were charged with libeling the plaintiff, Robert White, collector of customs for the Port of Georgetown. The libel took the form of letters addressed to the President of the United States, John Tyler, which contained allegations concerning White's fitness for public office. White filed exceptions with the Supreme Court after the lower court refused to allow White to introduce the letters into evidence at trial. *Id.* at 275-78.

On appeal, counsel for both the plaintiff in error, White, and for the defendants acknowledged that constitutional issues lurked beneath the common law questions raised by the lower court's ruling.[9] The ruling of the lower court was defended by the defendants on two grounds: that the communications were absolutely privileged since defendants had complained of a grievance to the officer who could redress it and that if the communication was not absolutely privileged, "yet it was so much

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[9] Counsel for White argued before the Supreme Court that: " 'Under the free dispensation of our Constitution and laws, where the greatest liberty of speech and of publication is allowed, and where this liberty, under the heat of political passions, is ever tending towards licentiousness, in assaults upon political adversaries who may be enjoying in office the fruits of party success, the questions here presented become most interesting, and the decisions that your honors may pass upon them will ascertain the value of that great right, to this description of citizens, "of being secure in their good reputation." ' " *White v. Nicholls*, 44 U.S. at 281.

Defense counsel raised the constitutional issue by arguing that the publication was sent to the President not " 'for the purpose of injuring the plaintiff's character, but solely for the purpose of obtaining his removal from office. It was a perfectly constitutional proceeding . . . .' " *Id.* at 282.

so as to compel the plaintiff to show that the acts were done without probable cause and with malice and that White has failed to make such averments in his declaration." *Id.* at 281.

The Supreme Court concluded that the lower court had erred in keeping the letters from the jury and that the letters could be considered by the jury on the question of malice by the defendants. *Id.* at 291. The Court rejected, first, defendants' contention that White had not adequately pled malicious conduct in his declaration. *Id.* at 284. The Court also ruled that, while the letter to President Tyler could be considered a petition for the redress of grievances, any privilege that attached to the letter was lost if the communication was made maliciously. In so holding, the Court commented that:

> The exposition of the English law of libel given by Chancellor Kent in the second volume of his Commentaries, part 4th, p. 22, we regard as strictly coincident with reason as it is with the modern adjudications of the courts. That law is stated by Chancellor Kent, citing particularly the authority of Best, J., in the case of *Fairman v. Ives*, 5 Barn & Ald., 642 to the following effect: "That petitions to the king or to parliament, or the secretary of war, for redress of any grievance, are privileged communications, and not actionable libels, provided the privilege is not abused. But if it appears that the communication was made maliciously, and without probable cause, the pretext under which it was made aggravates the case, and an action lies."

White v. Nicholls, 44 U.S. at 288.

As this court reads *White v. Nicholls*, it is led to the inescapable conclusion that the Supreme Court of 1845 would have ruled accordingly if there were any basis for finding that the first amendment afforded an absolute defense to a libel action that was unavailable at common

law in the District of Columbia, a jurisdiction where the Federal Constitution was applicable. The defense found to be available to the defendants in *White v. Nicholls* was thus one of qualified privilege. The qualified privilege so available appears identical to the privilege available to similarly situated defendants in the state of North Carolina who have complained to public officials regarding the fitness of their subordinates. *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67, 78 (1962); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891).

III. POLICY ISSUES

McDonald argues that he is entitled to judgment on the pleadings even if the court fails to find that his alleged conduct herein is absolutely protected by the petition clause of the first amendment due to the special circumstances of this case. McDonald advances various arguments in support of this contention. In a nutshell, McDonald requests that this court declare his conduct absolutely privileged from liability for defamation based upon public policy considerations if not upon clear consitutional precedent. The court finds the cumulative weight of McDonald's policy arguments to be unconvincing. It is the Congress, not the federal judiciary, that is assigned the policy-making role in the federal system. Our elected representatives might well conclude that defendants like McDonald must be insulated from liability in order to encourage those with relevant information regarding presidential appointees to come forward. Whether such a policy is sound is not, however, within the province of a district court.

If the court were inclined towards fashioning public policy, it could find no basis for concluding that the policies protected by or related to the petition clause were of more significance than the policies advanced by the speech clause. For, as the Supreme Court has stated in a case

interpreting the speech clause, "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people, and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931).

Despite their fundamental nature, first amendment rights have never been considered to be absolute and may in fact be restricted to the extent such restrictions serve a superior governmental interest. *Abood v. Detroit Board of Education*, 431 U.S. 209, 222-23, 97 S.Ct. 1782, 1792-1798, 52 L.Ed.2d 261 (1977); *Civil Service Commission v. National Assn. of Letter Carriers*, 413 U.S. 548, 564-67, 93 S.Ct. 2880, 2889-2891, 37 L.Ed.2d 796 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 606, 93 S.Ct. 2908, 2912, 37 L.Ed.2d 830 (1973). As Justice Holmes observed, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . . ." *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919). Consistent with this traditional recognition that the first amendment has its limits, the Supreme Court has found previously that complete immunity from liability for defamation is "an untenable construction of the first amendment." *Herbert v. Lando*, 441 U.S. 153, 176, 99 S.Ct. 1635, 1648, 60 L.Ed.2d 115 (1979).[10]

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[10] McDonald's primary argument for absolute privilege is premised largely upon two Supreme Court decisions in which the Sherman Act was interpreted as not reaching combinations to influence government officials. *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mineworkers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). *See supra* at 836-838. Yet, even McDonald acknowledges that the anti-trust immunity afforded by these decisions has its limits. As the Supreme Court ruled in a third Sherman Act case, "[f]irst amendment rights may

The *New York Times* decision was rendered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. at 270, 84 S.Ct. at 720. The court finds it difficult to discern how the interests and policies affected by the action now before it can be in any way different from those considered by the Supreme Court in *New York Times*.

This court is not the first judicial body to find an identity of interests underlying both the rights of "petition" and free speech. In that regard, the court notes that when the Supreme Court fashioned the requirements that plaintiffs must meet to recover in libel actions involving issues of free speech, it looked for guidance to the North Carolina decision of *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962). *See New York Times v. Sullivan*, 376 U.S. at 280, n. 20, 84 S.Ct. at 726, n. 20. In *Ponder v. Cobb*, county election officials sued the defendant for libel after the defendant had written letters to state officers critical of the election officials. The State Supreme Court concluded that the defendant was entitled to a qualified privilege "since the letters involved in these actions were addressed to . . . proper parties from or through whom redress might be expected." *Ponder v. Cobb*, 126 S.E.2d

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not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515, 92 S.Ct. 609, 614, 30 L.Ed.2d 642 (1972). Therefore, while a carrier, in combination with others, has the right of access to agencies and courts, within the limits of their proscribed procedures, to defeat applications of its competitors for certificates as highway carriers (and thereby eliminating the applicants as competitors), the combination may not, consistent with the Sherman Act, conspire to bar the same competitors their rightful access to those same agencies and courts. *Id.*

at 78. Thus, the *New York Times* standard that plaintiffs may recover in cases involving issues of free speech only upon a showing of actual malice, *New York Times v. Sullivan*, 376 U.S. at 280, 84 S.Ct. at 726, was based, at least in part, on the common law protection afforded in North Carolina to those who petition the government for the redress of grievances.[11]

IV. CONCLUSION

The court has reviewed the decision by lower federal courts cited by McDonald where the *Noerr* and *Pennington* holdings of the Supreme Court have been applied. To the extent those decisions interpret provisions of the Sherman Act, the court finds them inapplicable. To the extent those decisions apply *Noerr-Pennington* to other areas of the law, the court is persuaded by the ruling of the Seventh Circuit Court of Appeals in *Stern v. United States Gypsum*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977). In *Stern*, an Internal Revenue agent brought an action under 42 U.S.C. § 1985 against a corporation and its officers who had filed complaints concerning the agent's performance. Plaintiff also invoked the district court's pendent jurisdiction over several state claims, including defamation. Defendants argued that under the *Noerr* and *Pennington* decisions their conduct was absolutely privileged under the petition clause of the first amendment.

The Court of Appeals concluded that the act of filing complaints about government officials with their superiors fell within the constitutionally-protected right to petition for the redress of grievances. *Stern v. United States Gypsum*, 547 F.2d at 1342, 1343. However, dismissal of the § 1985 claim was found warranted, not because of

[11] The circle is neatly completed by also noting the identical nature of the protection afforded those who petitioned President Tyler for the redress of grievances in *White v. Nicholls*. *See supra* at 838-840.

the absolute nature of the right to petition, but due to the absence of any congressional intent to regulate the right of petition by way of § 1985. *Id.* at 1344. The state action for defamation was therefore dismissed for want of a federal question. *Id.* at 1346. Despite ordering the dismissal of the action in its entirety, the Seventh Circuit observed that:

> We have no quarrel with the proposition that a state's interest in protecting its citizens from common law torts justifies overriding these First Amendment considerations, when knowing falsity is alleged, and although expressing no opinion one way or the other, we are not to be understood as implying that Stern's [the plaintiff's] common law theories are unmeritorious. A similar overriding of the right to petition might likewise be sustainable in federal legislation which clearly and narrowly intended the effect.

Stern v. United States Gypsum, 547 F.2d at 1345.

The court has also considered and declines to follow the decision of the West Virginia Supreme Court in *Webb v. Fury*, 282 S.E.2d 28 (W.Va. 1981). For reasons discussed above, this court respectfully concludes that the majority in *Webb v. Fury* has extended the scope of the *Noerr-Pennington* rationale far beyond its proper boundaries.

The court concludes that the matter now before it is controlled by the principles of *White v. Nicholls*, 44 U.S. (3 How.) 266, 11 L.Ed. 591 (1845), and *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and its progeny. In rejecting McDonald's request to fashion an absolute privilege based solely upon public policy, the court is guided by the observation of Justice Holmes that "If a thing has been practiced for two hundreds years by common consent, it will need a strong case for the fourteenth amendment to affect it

. . . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S.Ct. 9, 9-10, 67 L.Ed. 107 (1922). Liberty, the Constitution, and the Federal Government have together survived in this country for close to 200 years despite the fact that defendants like McDonald have been unable to assert a defense of absolute privilege in actions against them for libel.

The court is further guided by a past Supreme Court opinion interpreting the speech clause, which the court finds equally relevant to the petition clause:

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse freedom. [citations] Reasonably limited, it was said by Story [citations] . . . this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

[*Gitlow v. New York*, 268 U.S. 652, 667, 45 S.Ct. 625, 630, 69 L.Ed. 1138 (1925).

Reasonably limited, the right to petition is of inestimable value to the republic. Without any limitations, the right to petition, in the court's opinion, would render itself meaningless. The right of petition presumes that the government will employ individuals with the abilities needed to redress the legitimate grievances of its citizens. Men and women of competence and integrity clearly would be discouraged, if not entirely dissuaded, from assuming public office if such a sacrifice also required the waiver of *all defenses* against libelous attacks no matter how malicious and false. See *White v. Nicholls*, 44 U.S. at 284.

For all the reasons discussed above, the court will deny McDonald's motion for judgment on the pleadings. The test applicable for judgment on the pleadings is whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law. *King v. Gemini Food Services, Inc.*, 438 F. Supp. 964, 966 (E.D.Va. 1976), *aff'd*, 562 F.2d 297 (4th Cir. 1977), *cert. denied*, 434 U.S. 1065, 98 S.Ct. 1242, 53 L.Ed.2d 766 (1978). McDonald is not entitled to judgment as a matter of law since Smith can prevail provided he proves actual malice by McDonald. *New York Times v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-726. In order to establish McDonald's actual malice at trial, Smith will be required to introduce evidence of "convincing clarity" [12] that McDonald knew that the statements contained in the letters to President Reagan were false or that he acted in "reckless disregard" of the truth of said allegations.

An Order will be entered accordingly.

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[12] *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 52, 91 S.Ct. at 1824.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1401

DAVID I. SMITH,
Plaintiff-Appellee,

versus

ROBERT MCDONALD,
Defendant-Appellant.

ORDER

[Filed Feb. 28, 1990]

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Turk

/s/ H. E. Widener, Jr.
For the Court